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AN EXAMINATION OF THE HART/DWORKIN DISPUTE

by

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A THESIS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled AN EXAMINATION OF THE HART/DWORKIN DISPUTE submitted by ROBERT ALAN REITER in partial fulfilment of the requirements for the degree of Masters in Philosophy.

ABSTRACT

I will try to answer the question "Can the validity of a legal rule be adequately depicted by its form, or is it the content that makes it a valid legal rule?" This question will be answered by defending Hart's position as it is spelled out in The Concept of Law -- a legal standard is determined by its form. This task will involve in part defending Hart's position from the attacks made by Dworkin in Taking Rights Seriously.

I will fend off Dworkin's attacks by implementing two strategies. The first strategy is itself two-fold. (1) I shall show that Dworkin misrepresents Hart's social rule theory; consequently his attack is ineffective. (2) I shall show that the disagreement between Hart and Dworkin regarding the validity of a legal standard has its origins in a dispute that concerns whether or not it is possible to formulate a method of adjudication.

The second strategy aims at showing that Hart's account of precedent and adjudication is not only more coherent but also a superior account of how precedent and rules actually function in a legal system.

By following these two strategies we will traverse the various levels of issues in the Hart/Dworkin dispute. These levels of issues are as follows: at the level of philosophy of law there is the question of legal validity, at the level of philosophy of mind and epistemology there is the question of whether there is a method for adjudication and what legal

reasoning is really like, and finally at the most fundamental level, the metaphysical issue regarding which ontology provides the best edifice for a theory of law.

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INTRODUCTION

I will try to answer the question "Can the validity of a legal rule be adequately depicted by its form, or is it the content that makes it a valid legal rule?" This question will be answered by defending Hart's position as it is spelled out in The Concept of Law (C.L.) -- a legal standard is determined by its form. This task will involve in part defending Hart's position from the attacks made by Dworkin in Taking Rights Seriously (T.R.S.).

If a legal standard is to be valid by its form, then there must be a criterion of identity for legal standards or what Hart refers to as "a rule of recognition". The rule of recognition in English law for example would include the standard that "What the Queen enacts in parliament is law". Given Hart's position that legal rules are a type of social rule, Hart is committed to the following thesis. "There is a social rule or set of social rules for law which settles the limits of the judge's duty to recognize any other rule or principle as law". This thesis is supported by a social rule theory emphasizing, "a duty or right exists when a social rule exists providing for such duties and rights; a social rule exists when the practice-conditions for a social rule exist".

If this thesis regarding the criterion of law is sound two corollaries follow from it. The first corollary is that "judicial discretion" exists in what Dworkin calls the 'strong' sense. In a case where no duties exist binding a judge to decide the case in a particular way, the judge must

use rules that are not legally binding. This implies the second corollary, namely, law has limits. If the thesis regarding judicial discretion is sound then some principles and rules are logically binding while others are not. In discretionary cases principles and rules outside the boundary of law are used to decide the cases.

Dworkin attempts to undercut all three theses by attacking the thesis regarding a criterion of law. He endeavours to do this by criticizing Hart's social rule theory. Dworkin's criticisms consist of providing counter-examples that cite cases where duties and rights exist even when the practice-conditions constituting social rules do not exist.

I will fend off Dworkin's attacks by implementing two strategies. The first strategy is itself two-fold. (1) I shall show that Dworkin misrepresents Hart's social rule theory; consequently his attack is ineffective. (2) I shall show that the disagreement between Hart and Dworkin regarding the validity of a legal standard has its origins in a dispute that concerns whether or not it is possible to formulate a method for adjudication. Hart concludes that it is impossible to provide a method for adjudication. Due to the major role that judicial discretion plays in adjudication, judicial creativity dominates the state of affairs in adjudication. Contrary to Hart, Dworkin proposes that there is a method of adjudication. Dworkin supports this position by emphasizing a view of legal reasoning which allows him to

conclude that particular cases (always subsumed under general principles, possessed by the judge) are arrived at by means of deduction from general principles. The second strategy aims at showing that Hart's account of precedent and adjudication (both being based on the fundamental account of a rule) is not only more coherent but also a superior account of how precedent and rules actually function in a legal system. Dworkin neglects an ontological account of rules, whereas Hart provides an ontological account of rules. This defence of Hart originates in the area of philosophy of mind and epistemology, but its ramifications extend to the philosophy of law. The defence will be carried out by relying on a Wittgensteinian methodology, and will attempt to show that Hart's notions of a rule and precedent and ultimately of adjudication are based on deep-rooted philosophical concepts that cannot be given up.

Section 1: Introduction

In chapters five and six of The Concept of Law (C.L.) several distinctions are drawn which constitute the lynch-pin of Hart's analysis of the concept of law: primary/secondary rules, habits/rules, obliged/obligated, rules of obligation/rules that do not impose obligation, and moral/legal obligation. These distinctions constitute an elucidation of the concept of law and the concepts that are located in the geography neighboring it. In chapter seven of C.L. the whole of Hart's piecemeal rule-based analysis of the concept of law is drawn together in a particular doctrine of adjudication. Hart's doctrine of adjudication is a synthesis of rule-formalism and rule-scepticism that is arrived at by epistemological considerations about rules. In turn, this doctrine of adjudication (judicial discretion in hard cases) is derived from the thesis that "legal validity is cashed out in terms of the form of legal rules". This derivation is made possible by the epistemological considerations about rules given in Hart's discussion of precedent (the principle of stare decisis).*

In order to understand how Hart ends up with these doctrines it is essential to make some primary remarks about the methodology that generates these doctrines. The philosophical strategies implemented by Hart in chapter seven of the C.L. are of the post-war analytic tradition.

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* Precedent here comprehends statute law and common or case law.

The strategy involves several of Wittgenstein's philosophical principles:

1) The Anti-generalization thesis -- this thesis stresses the inability of a theory to capture the richness of the phenomena that it attempts to explain (anti-theorizing).

2) Linguistic analysis of social phenomena (law) in terms of rules -- rules are understood as they function in games, i.e., language-games. Rules are both prescriptive and descriptive. The objective of linguistic analysis is to understand phenomena by looking at the context in which the words denoting the phenomena are used in. The maxim that sums up this point is "look (at the use of the word) do not think or theorize (do not construct theories about phenomena) -- anti-rationalism".

3) Synthesis strategy -- the dialectical technique of assimilating opposing theories into one account that resolves the problems that occur when the theories are taken as exhaustive explanations of the phenomena.

Principles 1 - 3 taken together provide Hart with the general structure of a grand strategy which aids him in coming to a conclusion that asserts the correctness of his doctrine of precedent and adjudication. Both the theories of Rule Formalism and Rule Scepticism say something that is undeniably true about precedent and adjudication, but they over-emphasize their points and in doing so the rule sceptic

and the formalist try to apply their theories to aspects of adjudication where it is absurd to do so. The fault inherent to these doctrines stems from over-emphasizing theory-building on a few facts rather than looking at the additional facts. As a result Rule Formalism and Scepticism provides us doctrines that are only partially true; each taken separately only gives us half of the language game about precedent and adjudication. Consequently, instead of elucidating the concepts denoting the practice, the theories divide the language game of precedent and adjudication in half, thus adding to the philosophical problems concerning precedent and adjudication.

Hart's tools of analysis for elucidating the functions of legal terms is a Model of Rules that is found in a game. The reason for using rules from a game is that they have the same logical structure as rules of law. The rules of games, language and adjudication not only share the characteristic of being descriptive and prescriptive, they also can be characterized as involving the elements of application and following. The following of a rule is the formalized principle that prescribes a systematic course of action which will bring about a desired state of affairs. On the other hand, the application of a rule concerns the moves that are necessary for implementing the rule. The application of the rule presupposes knowledge that is not given in the principle. For example, simply knowing the rule of Modus Ponens does not provide us with the ability to set up particular sentences before us in the form

((P then Q) and P) then Q, or to recognize others' productions of such sentences. All the following of Modus Ponens tells us is that when we have a sentence in the form ((P then Q) and P) we can validly conclude Q.

Furthermore Hart emphasizes that traditional definitions of legal terms involving rules of reference are inadequate. Definitions in terms of genus are not viable due to the confusion surrounding more fundamental legal terms (Hart, D.T.J., 46).

Seeing the shortcomings of traditional definitions of legal terms Hart formulated his own analysis. This analysis attempts to find the situations where the word in question plays a characteristic role and then explain it. The task involves specifying the condition under which the whole sentence is true by showing how the word is used in drawing the conclusions from the rule in the particular case (Hart, D.T.J., 47).

A prerequisite for understanding the practice of precedent and adjudication is to have a grasp on two competing social needs (natural truisms) which foundationalize the two practices -- "... the need for certain rules, which can over great areas of conduct safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues and the need to leave open, for latter settlement by an informed official choice issues which can only be properly appreciated and settled when they arise in a concrete case" (Hart, C.L., 127).

Hart elucidates why these opposing social needs are essential to precedent and adjudication by looking at two aspects of the practice: questions about the epistemological status of and the binding force (validity) in rule-governed social practices. Prima facie judicial adjudication involves a formal giving or pronouncing of a judgment or a decree in a case or the entry of a decree by the court in respect to the parties in the case. The primary means of coming to a decision in judicial adjudication is by implementing arguments from precedent. 'Precedent', a past decision that is similar in fact and goal to the case that has to be decided, is defined by Black as:

> An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in fact or legal principles to the case under consideration are called precedent. A rule of law established for the first time by the court for a particular type of case and thereafter referred to in deciding similar cases.
>
> (Black's Law Dictionary)

Hart's main concern lies with trying to determine the nature of the binding force that precedent has on judges who decide new cases on the basis of prior decisions. Furthermore, Hart also wishes to understand the epistemological moves that are made in arguments from precedent -- "where is the dividing line between valid and invalid arguments from precedent"? At what point on the scale of similarity between cases does argument from precedent apply? There

are core cases where there is a great deal of similarity between cases. These are called easy cases of adjudication. Hard cases are those cases with distant resemblances to past cases or have characteristics that overlap with several past cases. These penumbra of uncertainty cases, defying the simple adjudication from precedent that occurs in core cases, require an element in addition to mere parallel arguments in order to be solved. It is only by answering the above questions that Hart thinks he is allowed to go on to give a viable doctrine of precedent and adjudication.

The tradition has provided two opposing theories that attempt to determine the nature of the binding force of precedent and where to draw the line on the use of precedent. Rule Formalism emphasizes the need for certain rules. Even in hard cases where the similarity of the past and present case prima facie seem distant, the argument from precedent can still be used as effectively as it is used in core cases. A Rule Formalist formulates methods of adjudication which provide a means for applying precedent even in hard cases where the application of precedent is in question. In effect Rule Formalists advocate mechanical jurisprudence which denies the possibility of judicial discretion.

Dworkin's theory stands as a version of Rule Formalism. Dworkin argues that the bindingness of precedent is ultimately cashed out in terms of moral bindingness. He thus provides a means of adjudication for hard cases that goes beyond mere arguments of precedent based on positive law.

> The first is the idea of the 'intention' or 'purpose' of a particular statute or statutory clause. ... The second is the concept of principles that 'underlie' or are 'embedded in' the positive rules of law. This concept provides a bridge between the political justification of the doctrine that like cases should be decided alike and those hard cases in which it is unclear what that general doctrine requires.
> (Dworkin, T.R.S. 105)

He foundationalizes arguments from precedents on hyper-positivist legal principles which unite positive law precedents and statutes with general principles of justice in the attempt to bridge the gap that exists between core and hard cases. The device he employs to bridge the gap between hard and core cases is called Herculean Theorizing. Dworkin invents a "lawyer of superhuman skill, learning, patience and acumen" (T.R.S. 105) called Hercules. Hercules constructs "a scheme of abstract and concrete principles that provide a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well." (T.R.S. 116-117). Hercules justifies a vertical and a horizontal ordering:

> Hercules must arrange justification of principle at each of these levels so that the justification is consistent with principles taken to provide the justification of higher levels. The horizontal ordering simply requires that the principles taken to justify a decision at one level must also be consistent with the justification offered for other decisions at that level.
> (Dworkin, T.R.S. 117)

Hercules then works the whole scheme out in advance, so that he can present any foreseeable actual litigant

with the correct decision in the case and the full justification for that decision (cf. T.R.S. 117).

Herculean theorizing can therefore be seen as a theory of adjudication that always provides one right answer for a case regardless of how hard the case is. When reasoning from parallel cases by the use of precedent fails to generate one right answer, Herculean theorizing, according to Dworkin, can provide such an answer.

> These concepts together define legal rights as a function, though a very special function, of political rights. If a judge accepts the settled practices of his legal system - if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules - then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices. The concepts of legislative purpose and common law principles are devices for applying that general political theory to controversial issues about legal rights.
>
> (Dworkin, T.R.S. 105)

The notion of justifying legal practices (existing precedents, statutes and common law) is clarified by Dworkin's use of the notion of "Reflective Equilibrium". The epistemological presupposition involved in Dworkin's program is that proper judicial reasoning is always from a general principle to the particular case. This notion is implemented with the following effect: Herculean theorizing as it is realized by Hercule's employment of Reflective Equilibrium, thereby guaranteeing judicial decisions that are more consistent than adjudication that is based on mere judicial discretion. Herculean theorizing and Reflective Equilibrium jointly provide a formula into which the judge can place all the raw factors that are relevant to the case, and churn

out a decision. Dworkin's formula for adjudication is much like a chemical formula where opposite charges of the reaction must be balanced out in order to decide the case fairly. According to Dworkin, the method is successful so long as the judge remains "articulately consistent" while going through the steps of the formula.

On the other hand, Rule Scepticism emphasizes the need to leave open decisions for later settlement by informed officials who are faced with the concrete case itself. The point here is that hard cases which lack similarity to past cases defy being decided purely on the basis of past decisions. Rule Scepticism goes as far to say that there is no binding force at all in precedent even in "easy" cases. What prima facie seems as a binding force between past and present decisions, even in core cases, is merely judicial custom which if broken is met with by coercion. Contrary to Rule Formalism, Rule Scepticism explains adjudication, not in terms of rigid bindingness that reduces decisions to deductions derived from general principles, but in terms of judicial discretion. The notion of 'certainty' supposedly involved with applying a legal rule is given up for the position that emphasizes that every decision is a fresh legislation that is achieved by the disciplined legal creativity of a judge.

Section 2: The Implementation of the Strategy

Now that a picture of Hart's strategy and the positions involved have been painted with a broad brush it is time to

fill in the details of the argument. In several places I will augment Hart's arguments with my own arguments. The intention here is not to provide my own theory of precedent but rather to give more plausibility to Hart's.

All forms of Rule Formalism represent the essence of legal argument as follows:

> Φ All valid judicial decisions are arrived at by means of syllogistic reasoning. The judicial syllogism has three parts: a major premise, containing a general principle from a theory of justice and prescribing a particular kind of action; a minor premise, containing the factors representative of the case in question and in some way indicating the class containment existing between the principle and the case; and a conclusion that decides a particular case on the basis of the prescriptions provided by the general principle.

This position is established by positing the following premises which stand as prerequisites for mechanical jurisprudence:

> 1) The meaning of the words in a statute or <u>ratio decidendi</u> common law rule are frozen. This premise minimizes the need for judicial discretion. The judge does not choose the meaning of words in the description of the case before him. This premise presupposes that the factors in the case are designated by legal terms which resemble the terms cited in the statute or

rule sufficiently closely so as not to be problematic -- the factors in a case are always subsumable under the general principle or statute.

2) We always know all the relevant factors involved in the case in question. This premise is necessary for establishing the correct class containment relationship existing between the principle and the case.

3) Presupposes 2. Determinacy of Aim. What is beneficial for society is determined by the particular situation we find ourselves in. We must have knowledge of future circumstances in order to have knowledge of the social-political aims of the future. Once we acquire these two forms of knowledge with certainty we can syllogistically deduce the appropriate decisions for all possible cases. For once this is acquired the aims established in the future situations could be related to the prescriptions of general principles.

Hart attacks all three premises with epistemological arguments that are contained on pages 123-7 of C.L. In response to the first premise, Hart emphasizes that the application of many words in statutes and common law rules are not clear. He accomplishes this with the example "Motor vehicles are not allowed in the park".

> In all fields of experience, not only with rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide there will indeed

> be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable. (If anything is a vehicle a motor car is one) but there will also be cases where it is not clear whether they apply or not. ('Does "vehicle" used here include bicyles, airplanes, roller skates?') The latters are fact situations, continually thrown up by nature or human invention, which possess only some of the features of the plain case but others which they lack.
>
> (Hart, C.L. 123)

Hart's point is well illustrated by the following two cases. For example, Newberry v. Simmonds[1] is a case that turned on deciding whether or not the term "mechanically propelled" is a term of classification or a term of definition. It was decided that the former was correct, and the defendent that had a motor vehicle with no motor or license was prosecuted on the basis that lacking a motor was of no significance. Although the vehicle could not at the time the summons was laid be mechanically propelled, it was still classified as such. The deciding factor was that the defendent intended and was easily able to make the car mobile once again.

In Smart v. Allen and Another[2], the decision was in favor of the defendent and relied heavily on Newberry v. Simmond. The deciding factor was that the car was not intended to be made mobile; rather, its use was intended for

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1. Newberry v. Simmonds, (1961 2QB. 345; 2WLR 675) All E.R. 318
2. Smart v. Allen and Another, (1962 2QB. 391; 2WLR) All E.R. 138

scrap. Another factor deciding the case was that the car could have been made mobile only with a great deal of unreasonable difficulty and expense.

Thus, there are cases where the resemblance that exists between the factors in the precedent and the case are distant. In cases involving opentexturedness, the judge is saddled with the dilemma of deciding whether the factors given in the present case fall under or outside the general terms in the statute or common law rules.

Hart undercuts the second premise of the Rule Formalist's argument by attacking a presupposition that the premise is based on: "a world fit for mechanical jurisprudence is one that is characterized by a finite number of features".

> If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they would combine were known to us, then provisions could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for everything, since it could be known, something could be done and specified in advance by the rule.
>
> (Hart, C.L., 125)

Hart's point is that the Rule Formalist's presupposition is absurd. The world is not characterized by a finite number of features; consequently, human legislators cannot have knowledge of all the possible combinations of circumstances which the future may bring.

By undercutting the second premise, Hart also undercuts the third. The inability to anticipate future situations

brings with it a relative indeterminacy of aim. If we cannot have certain knowledge of future situations, we cannot possibly have incorrigible knowledge of what is beneficial for society, for the features of the situation determine what actions are beneficial for society.

> When we are bold enough to frame some general rule of conduct (eg. a rule that no vehicle may be taken into the park), the language used in the context fixes the necessary conditions which anything must satisfy if it is to be within its scope, and certain clear example of what is certainty within its scope may be present to our minds. They are the paradigm, clear cases (the motor car, the bus, the motorcycle); and our aim in legislating is so far determined because we have made a certain choice. We have initially settled the question that peace and quiet in the park is to be maintained at the cost, at any rate of the exclusion of these things. On the other hand, until we have put the general aim of peace in the park into conjunction with cases which we did not, or perhaps could not, initially envisage (perhaps a toy motor-car electrically propelled) our aim is, in this direction, indeterminate.
>
> (Hart, C.L., 125)

Hart's three epistemological arguments in effect argue against the position inherent in Rule Formalism that emphasizes that there is a precise method for adjudication. He does this by establishing the essential role that judicial discretion plays in adjudication, given the human predicament and the opentexturedness of legal language.

Section 3: An Attack on Rule Formalism

The role of judicial discretion in adjudication is guaranteed by arguments directed towards showing that there

is no method for adjudication -- the Rule Formalist notion of a method for adjudication is fallacious. A method is something that is distinguished from a knack. A knack is an ability to succeed in doing a particular action without the aid of formalized principles. When doing something by a knack the means allowing us to do a certain action is just felt to be right. A method, on the other hand, involves formalized principles laid out in a systematic manner. The ultimate end of the method is to provide a means for succeeding in a particular action (ie. adjudicating in a way that has consequences which are the most acceptable). The method is a sufficient condition for success. Doing something with the aid of a method involves proceeding in a systematic manner in accordance with what the principle prescribes. Therefore, to proceed by a method presupposes an ability that is acquired by knack namely, the application of the method.

For Rule Formalism to provide a method of adjudication it must remain faithful to the following tenets:

1) Following the principles of some system of adjudication forces the judge to adjudicate in the manner prescribed by the method -- the judge is in some sense bound to use the method.

2) Decisions are syllogistically deduced from general principles. Principles can be divided into two major groups: principles of justice, for example, that wrong-doers cannot benefit from their wrong doing, and

principles of procedure, for example, judges are bound by the decisions of the higher courts, or judges must remain articulately consistent in their decisions.

3) All judges who use the method correctly will come to the same decision -- the One Right Answer Thesis -- the counter-thesis to judicial discretion.

4) Using the method of adjudication provided by Rule Formalism is a sufficient condition for successful adjudication. Adjudication carried out by means of a method will always have consequences that are more just, more articulately consistent in terms of facts and aims, and more superior in legal reasoning. (If this is not the case the proposed method is not a sufficient condition for successful adjudication; consequently there would be no point in having a method for the knack would allow us to do the same).

To determine whether or not Rule Formalism can provide an adequate method of adjudication, the proposed method must pass the criterion of a method. This is done by comparing the account of a method required for adjudication with an account of one of the paradigms of a method, namely, the method for Modus Ponens. People argue using Modus Ponens in everyday life without knowing the rules for it. When they become acquainted with the rules of logic they acquire a formalized knowledge of the rules. The knack used in Modus Ponens is replaced by a method, namely, the rule "if you have P and Q and if you assert the antecedent P, then

you can conclude that Q follows". Instead of trying to conclude Q on the basis of its feeling right (by knack, as it is the case in judicial discretion) we can conclude it on the basis of a rule, that Q follows from ((P then Q) & P). Conversely, in the case of adjudication instead of proceeding to construct a decision by knack (judicial discretion, or by what feels appropriate) we can use a method which systematically compounds factors relevant to a particular judicial decision.

Although both the accounts of the methods for adjudication and Modus Ponens have the notion of what follows from a formalized principle in common, they also differ. All that is necessary for providing a method for Modus Ponens is to state the following of the principle. But to have an account for the method for adjudication the Rule Formalist must also explicate the application of the method. The Rule Formalist must state how the principles of the method can be used. He explains the use of the method of adjudication by specifying how the method is applied in the particular case before the judge.

It may be argued that the account of a method for adjudication and Modus Ponens do not differ -- the account of the application is not essential for giving an account of the method for adjudication. This proposal is shown to be false once the difference in the two methods is brought out. Unlike the method for Modus Ponens the method for adjudication must inform the person using the method which

principles, statutes, common law rules and precedents must be used at a particular point in the decision that the judge is formulating.

In the case of Modus Ponens we use the method after we have acquired the premises -- the premises are given. The method for adjudication is different, for it must supply its own principles, statutes, common law rules and precedents in order for us to say that by using the method we can administer justice successfully. The implementation of the method for adjudication comes prior to having the principle of justice -- the method itself generates the principles appropriate to the case and in doing so places the judge in an optimum position for the administration of justice. A method of adjudication is an attempt to systematize the creative process involved in choosing the appropriate principles, meanings of legal terms, and statutes and precedents for the particular case before the judge. Since the method has to account for choosing which legal elements must be used at a specific point in a particular decision, it is essential for an account of the method to explain how it is used. In the case of Modus Ponens, the specific conditions for its application are not given in the method -- it is not formalized but something given in everyday life. The knack for applying Modus Ponens allows us to establish premises having the appropriate symbolic form ((P then Q) & P) which in turn allows us to conclude that Q follows by the rule for Modus Ponens. The method for

adjudication differs from the method for Modus Ponens in that the former not only attempts to formalize a rule and to state what follows from it but also attempts to formalize the application of the rule.

The criticism filed against the Rule Formalist's attempt at providing a method, that involves explaining its application, is that the Rule Formalist is over-rationalizing -- formalizing something that is impossible to formalize. If this is the case, then the Rule Formalist cannot provide a method; consequently, the status of the so-called method is reduced to being mere advice for judges. This attack aims at drawing the similarity between judicial adjudication and the paradigm of a knack, namely, cooking. Cooking well cannot be formalized. If this was not the case we would expect that by reading a cookbook we would all become master chefs; but this is absurd. Cooking well requires a knack or a natural ability. The factors relevant to cooking well could never be formalized for they are too complex. The fact that the mere following of a cookbook does not produce good cooks is a good reason for taking this point. The cookbook provides a general outline of how to proceed when cooking -- not a systematic procedure for cooking well. A method for cooking well would have to be more specific than the mere listing of the ingredients, their amounts, and their cooking time. To provide a method for cooking well you would have to specify: the cooking time in relation to particular factors such as the type of

stove, the quality of the ingredients -- e.g., if the meat is tough, a longer cooking time is required. This is just one example of what must be specified in a method for cooking well; there are many more. The complexity and the number of specifications necessary for providing an adequate method for cooking makes an endeavor at formalizing the knack for cooking impossible.

Conversely, in the case of providing a method for adjudication, the Rule Formalist falls into the infinite regress of specifying what must be done in a particular case in order to administer justice. Just citing the general principle, "Use the relevant principles, statutes, precedents and legal terms and this will place you in an optimum position for administering justice", is as helpful to judges as the cookbook is for cooks. Stating this principle is not a sufficient condition for either adjudicating successfully or for guaranteeing that all judges who follow the method for adjudication will come to the same right answer. If it was a sufficient condition, all judges who use the method would come to the same decision and would give better decisions. But this is not the case. In order to provide an account that specifies exactly what legal element fits in a particular part of a particular type of judicial decision, one would have to formulate every type of decision relevant to every conceivable case involving adjudication. The Rule Formalist cannot possibly attempt to formalize the knack for adjudication just as he

cannot formalize the knack for cooking well. In attempting to provide a method for adjudication, the Rule Formalist mistakenly over-rationalizes or over-generalizes a knack which is essentially non-rational and particular -- not subject to formalized systemization due to their complexity and individuality. At best the Rule Formalist's formalization of adjudication leaves judges with advise on how to adjudicate well as opposed to a systematic means of procedure.

In defence of the Rule Formalist, one could interpret the account of the method of adjudication as an attempt to strike a mean somewhere between being too specific and being too general. The Rule Formalist's method does not state any particular principle that serves as a sufficient condition for a judge's being able to adjudicate well, and it does not specify every possible instance where the method can be used. Instead, he provides the judge with a systematic procedure (formula) which takes into account all the factors relevant for adjudicating a particular case properly. The method of adjudication provides us with a formula into which we insert the particular factors relevant to the situation the judge is faced with when attempting to adjudicate. By listing the preconditions necessary for particular types of adjudication, ie. consistent adjudication in criminal law requires X - Y set of principles of justice whereas in civil cases we require another set of principles, the Rule Formalist would

provide a means for inserting the particulars into the formula. This provides us with a method of adjudication. The list of preconditions necessary for the particular type of adjudication serves as a general principle to follow, and guides the judge in making the appropriate choice of principles for a particular case.

Even though this interpretation provides the Rule Formalist with the strongest possible position that can be given in defence of there being a method, the criticism that he cannot account for the application of the method still holds. If the Rule Formalist was really giving judges a method, we would expect it to provide a means of procedure that is as specific as that provided by the paradigm of a method. The means of procedure given in the instructions to make a phone call is a paradigm of a method. Although this method presupposes that we already have a knack for turning the dial and inserting the proper amount of change, the instructions for making a telephone call are a sufficient condition for making a telephone call. If we have a knack for dialing and inserting the proper amount of change, by following the procedure posted in the telephone booth we are assured that we will succeed in making a telephone call. By following the procedure there is nothing that can go wrong, provided that the telephone is operative. The instructions are simple or specific enough to rule out all ambiguity in making a phone call. The means of procedure merely consists of formalized principles of

mechanical procedure. But this is not the case in the method for adjudication. This method must formalize the creativity involved in selecting policies, principles, precedents and the particular meanings of legal terms that are relevant to the particular case the judge is attempting to decide. Such a method must provide a means of procedure which corresponds to the complexity of the creative process. The method must state how to select legal elements at every point of the decision. The attempt to formalize the movement of this knack involves mapping the moves to a smaller scale (general principles). But when the movement is reduced to this scale it does not constitute a sufficient condition for succeeding at adjudication. By following it we are not guaranteed any success. Some judges who follow a method of adjudication may succeed in administering justice, some may not; some may come to the same decision, others may not. In order to provide an adequate means of procedure the Rule Formalist cannot just provide general preconditions, ie. the advice of using articulately consistent sets of principles necessary for the particular types of adjudication. He must specify the relevant preconditions for every type of decision in every conceivable situation that comes before the judge. This prevents the Rule Formalist from reducing the means of movement in adjudication to a smaller scale (generalize). The attempt to account for the application of the method of adjudication is analogous to drawing a map of Canada that

has a one mile to one mile scale in order to ensure detail. The Rule Formalist cannot provide an adequate method. No method can capture the complexity involved in adjudicating. Thus his preconditions for various judicial decisions stands as mere advice for judges. Consequently, the Rule Formalist cannot resolve the dilemma in establishing a method for adjudication, namely, being too specific or too general. He may succeed in giving the following of the method, but to give an account of the application of the method forces him into an infinite regress of specifying all the possible situations (cases) where the method can be applied.

To conclude the discussion of Rule Formalism I would like to tie together the arguments given. Rule Formalism over-emphasizes the need for certainty in precedent. Although stare decisis plays an important role in core cases, where the similarity between past and present cases is unproblematically close, its role cannot be generalized to describe adjudication in hard cases where the similarity between past and present cases is problematically distant. Hard cases reflect the need in law for leaving openings for future adjudication. Rule Formalism's over-emphasis on certainty causes it to miss one half of the essential character of precedent and adjudication, namely, the need to leave decisions open. To describe the epistemology inherent in the Rule Formalist position we would have to say all judicial decisions would be made with certainty even

prior to the case actually occurring. Like the Platonic view of the world, the Rule Formalist sees the state of affairs in adjudication as frozen: that is to say, there are no changes.

Section 4: An Attack on Rule Scepticism

The problem with Rule Formalism is that it has an excessive concern with rationalizing. This is what leads it from making a valid point about certainty in core cases to an absurdity -- mechanical jurisprudence. Rule Scepticism is also a defective theory of precedent and adjudication, but its problem stems from a deficient concern for rationality; its problem is the mirror image of Rule Formalism's dilemma. Rule Scepticism under-emphasizes the importance that rules play (*stare decisis*). Consequently, Rule Scepticism also leads to absurdity. It attempts to account for a legal system purely in terms of judicial discretion and coercion.

Hart's attack on Rule Scepticism attempts to undercut its fundamental tenet that "law is *always* no more than the result of judicial discretion, and that rules are non-existent; consequently, *stare decisis* is illusory". This notion is explained by Allen in *Law in the Making* (*L.M.*):

> We say that (a judge) is bound by the decisions of higher courts; and so he undoubtedly is. But the superior court does not impose fetters upon him; he places the fetters on his own hands. He has to decide whether the case cited to him is truly apposite to the circumstances in question and whether it accurately embodies the principle which he is seeking. The humblest judicial officer has to decide for himself

> whether he is or is not bound, in the particular circumstances, by any given decision of the House of Lords. His task is often exceedingly difficult. Not only is it true that the circumstances of two cases are seldom exactly identical, but sometimes it is by no means easy to discover the true reasons which led the superior court to its conclusion.
> (Allen, L.M. 290-1)

The problem Hart sees with this tenet is how can one have judicial discretion without rules that constitute or give status to the statements resulting from a judge using his discretion. This problem of Rule Scepticism arises from Hart's comments on the open-texture of law and the gaps in law. In section one of chapter seven, Hart emphasizes the open-texture of statutes and custom in order to establish the necessity of judicial discretion in the law. This is accomplished by illustrating the uncertainty of applying precedents to penumbral cases. Due to the vagueness of words in statutes, judges necessarily use their discretion or interpret words in order to apply particular statutes to the penumbral case. Rule Scepticism takes the notion of open-texture to its extreme, and posits that not only is there uncertainty with applying statutes in penumbral cases but uncertainty also exists when applying the legal rule to cases that are similar to the past case (core cases). Hart's notion of "scorer's discretion" has two roles in the strategy of argumentation in chapter seven. First, it illustrates Hart's position of being between Rule Formalism and Scepticism. The official scorer or judge has discretion (the aspect of the law the Rule

Sceptic emphasizes). The second role of the notion of scorer's discretion, the one used to undercut Rule Scepticism, is that of illustrating the ambiguity involved in the fundamental claim of Rule Scepticism, namely, "law is what the judge decides by exercising his discretion". In the polemic against Rule Scepticism the notion of judicial discretion brings out certain distinctions which are necessary for understanding the way in which discretionary decisions are still authoritative, i.e., legally valid. After spelling out these distinctions Hart then undercuts Rule Scepticism by showing that ultimately it cannot capture the distinctions. I shall now explain this in some detail.

The Rule Sceptic adopts an extreme view of the open-texture of statutes and common law rules in order to justify the conclusion that rules cannot exist in a legal system. Rules are uncertain even in core cases; judicial discretion is necessary for rules to be of any use. The Rule Sceptic also supports this claim by citing J. Chipman Grey's maxim that "Judges have the last word on law". (C.L. 137). The Sceptic goes on to say that, since judges have the last word even on law that the legislature passes, the judge in effect makes law. The judge's interpretation of statutes and precedents decides what they mean, and consequently, whether or not a particular case really does fall under the rule that the judge may be considering. The Rule Sceptic thinks that from this it follows: rules are

merely a source of law as opposed to law (Hart C.L. 1). Statutes and precedents do not serve as rules; at best they function as signs noting predictions of judicial decisions or patterns of judicial behaviour. Rule Scepticism takes an external point of view towards a legal system. It does not capture fully the attitude the members of the legal society have towards the law or how standards function in the lives of citizens to justify and criticize behaviour. Rule Scepticism analyzes legal behaviour in terms of habits of obedience and the predictive possibility of punishment resulting from deviation. Obligation is irrelevant to explaining the bindingness of law. Habits of obedience and coercion are the two factors that bind a legal system together by promoting conformity to the law and regularity in judicial decisions.

Hart sees the problem with Rule Scepticism to be an attempt to give status or authority to judicial discretion by using an analysis which is void of rules. On page 138 C.L. Hart states that Rule Scepticism is the result of exploiting "... the ambiguity of such statements as the 'law is what the courts say it is', and the account which the theory must, to be consistent, give of the relation of non-official statements of law to the official statements of a court". Hart suggests this ambiguity can be understood by considering an analogue in the case of a game. Some competitive games have the institution of an official scorer. His statements about the points made by the two

opposing teams have a status that is distinct from the statements of the players. The reason is that the official scorer's statements are authoritative and final. Hart suggests that the status of the official score is given by a rule that assigns the scoring official a function (power-conferring rules) and by rules that bind him to enforce the rules of the particular game (rules imposing duties on the scorer). Although the scorer is bound to make the decisions that take the rule and nature of the game into account he still has power to use his discretion. When an incident occurs where two rules conflict, making it impossible to decide the case purely on the basis of rules, the scorer must resort to using discretion. In this case all that he is bound to do is decide the case; the rules of the game do not bind him to decide in a certain way. In cases where part of the rule of recognition is in question, Hart agrees with the sceptic, that there is uncertainty and that the decision of the judge can only be predicted (C.L. 150). These cases are uncertain due to the fact that it is questionable whether or not the issue at hand is even a legal matter; this occurs at the limits of law. But Hart agrees with the Rule Formalist, that in an incident that falls under one rule (core cases) the decision is determined by rules, for the case is certain since there is no conflict.

Two distinctions can be drawn from Hart's notion of scorer's discretion: the first distinction is that existing

between validity or the status of official and non-official statements about the scores in a game. The second distinction exists between the game of scorer's discretion and scorer's discretion in a game. In the latter case scorer's discretion is given status by the particular game that constitutes it by some rule. Rules of cricket or baseball are defining features of what the games are. The rules demand that incidents in the game be assessed by means of the scoring rule. Scorer's discretion is restricted by rules that serve as guide-lines when making decisions; scorer's discretion is used only in cases not decided purely by reference to rules -- it is used where the rules leave gaps or where there is open-texture regarding the meanings of legal terms. On the other hand, the game of "scorer's discretion" is not constituted by or has no guide-lines restricting it by rules of a competitive game. The scorer has complete discretion. His discretion can best be described as sheer caprice, for decisions not based on rules have no status -- there are no rules that constitute his discretion or serve as guide-lines for restricting discretion.

> We are able to distinguish a normal game from the game of 'scorer's discretion' simply because the scoring rule, though it has, like other rules, its area of open texture where the scorer has to exercise a choice, yet has a core of settled meaning. It is this which the scorer is not free to depart from, and which, so far as it goes, constitutes the standard of correct and incorrect scoring, both for the player, in making his unofficial statements as to the score, and for the scorer in his official

> rulings. It is this that makes it true to say that the scorer's rulings are, though final, not infallible. The same is true in law.
>
> (Hart, C.L. 140)

The Rule Sceptic is now faced with the following problem: "What binds officials and citizens in a legal system if it is not rules?", or, "what ensures that judicial discretion is not sheer caprice -- what underwrites regularity in the decisions of a judge?" There seems to be one alternative that fits the bill: Judicial custom and coercion. This alternative is perfectly consistent with Rule Scepticism's fundamental claim that law is what the court decides and that judicial behaviour is merely predictable. Judicial custom, in place of rules, sets the guide-lines (boundaries) to a decision. If a decision is irregular or radically inconsistent with what judicial custom advocates, coercion is applied. The judge's decision is appealed and his decision serves as no move at all. Coercion takes the place of obligation. Judges are obliged to remain regular in their decisions, rather than obligated to follow rules that they have accepted.

This alternative is not problem free. To account for the bindingness of law and the regularity of judicial behaviour in terms of judicial custom and coercion places the Rule Sceptic in an absurd position. If legal obligation is non-existent and coercion is the only binding element in a legal system then a law applies to our case if and only if there is a possibility of punishment for deviation from

the law or customary judicial behaviour. This is the source of the problems that Hart found in Austin's Command Theory of Law.

Hart spells out Austin's errors by introducing new analytic devices which attempt to account for the salient features of legal obligation in a way that Austin's analytic tools cannot. One such device is the "internal/external point of view". Austin's analysis is from an external point of view; it merely notes the behavioural regularity of the subjects and the predictive possibility that punishment will follow if there is deviation from a command. This point of view cannot account for meaningful behaviour that necessarily involves the element of a criterion. The convergent/meaningful behaviour distinction can only be made if the analysis is from an internal point of view. This unavoidably bring us near, if not into, the realm of philosophy of mind. An internal point of view makes the distinction between a habit and a social rule possible. This analytic device accounts for "what it means for an individual to follow a rule or how people in the legal system view their own behaviour (critical reflective behaviour)". All that is required for a habit to exist is that the behaviour of a group of people be convergent or regular. On the other hand, for a rule to exist, deviation from the rule warrants criticism. Criticism made in regard to the deviation from a standard is generally accepted as a

good reason for making it (C.L. 54). In addition to an internal aspect which accounts for justifications and reasons for behaviour, the social rule shares with the habit the appearance of uniform behaviour that can be recorded by the observer.

Austin's analysis of obligation is given purely in terms of habits of obedience, which can be established by the simple use of empirical observation of behaviour (since to have a habit merely requires convergent behaviour). Hart sees this empirical analysis as obscuring the fact that where rules exist, deviations from them are not merely grounds for a prediction that hostile reaction will follow or that a court will apply sanctions to those who break them, but are regarded as reasons and justifications for such reactions and for applying the standards (C.L. 82). Austin's analysis cannot account for how a rule functions in the life of an individual in a legal system; i.e., how rules give reasons for acting in certain ways. Due to the Command Theory's external point of view, it can merely note the behavioural regularity that results from following any social rule.

Section 5: Winch

This line of attack against the Command Theory of Law can be taken beyond the point that Hart takes it and to the level of philosophy of social science. By taking the analysis to this level we can determine exactly how Austin came to make the mistake of analyzing a legal

system from the external point of view. Winch (S.S.R.P.) holds that the problem of viewing a social institution from an external point of view arises from the more basic mistake of viewing the distinction between the social sciences and the natural sciences as one of degree. The difference between the social and the natural sciences is that the former due to its subject matter (man) is complex, whereas the latter which studies purely physical phenomenon is relatively simple. Winch cites J.S. Mill as holding this view, but Austin could have been cited just as easily (S.S.R.P., 78-80). The reason being that both Mill and Austin attempt to explain human behaviour purely in terms of behavioural regularity or predictive possibility that certain human behaviour would happen in certain circumstances.

Winch sees the distinction between the social and natural sciences not as one of degree but of kind. He supports this claim by examining the concepts involved in complex and simple behaviour. The concepts we apply to complex behaviour are logically different from those we apply to the less complex behaviour (S.S.R.P., 72). This is argued for by analogy with the example of the concepts "Heap of grain" and "Freezing of water" (S.S.R.P., 73). When considering a heap of grain the question of "how many grains does it take to make one" is not answered empirically. The criterion for a heap of grain and a non-heap are vague; there is no particular amount that makes a heap. But in the case of "how many degrees does it take to reduce the

temperature of a bucket of water for it to freeze" the answer can be settled experimentally or empirically. The criteria is much sharper than in the case of a heap of grain. There is a particular temperature which is necessary in order to freeze water. For the same reason we cannot talk about complex behaviour and simple behaviour in the same way. The reaction of a dog in pain is much more complex than that of a tree which is being chopped down (S.S.R.P., 73). I cannot describe the complex movement of writhing in purely mechanical terms using space time co-ordinates. The concept of writhing belongs to a quite different framework from that of the concept of movement in terms of space-time co-ordinates, and it is the former rather than the latter which is appropriate to the conception of the dog as an animated creature. Winch goes on to conclude that "anyone who thought that a study of the mechanics of the movement of animate life would throw light on the concept of animate life would be the victim of conceptual misunderstanding" (S.S.R.P., 74).

The notion of a difference of kind is used by Winch to elucidate the differences between stimulus-response (habits) and conceptual thought (that involving rules). It is here where Winch's and Hart's paths converge. Winch, like Hart, explains conceptual thought and meaningful behaviour as being rooted in a social context which necessarily involves rules. Conceptual thought is of course much more complex than stimulus-response, but what is more important is the

logical differences between the concepts that are applicable (S.S.R.P., 72). A man learns to understand a rule, but a dog just learns to react in certain ways. The difference betweeen these concepts follows but cannot be explained in terms of the difference in complexity of the reaction (S.S.R.P., 74). A social context is inherent in the concept of understanding; and it is a place where only the man, not the dog, can participate. What is emphasized here is that due to conceptual differences it is logically impossible to apply the same methodological considerations when dealing with the behaviour of a man and a dog. If we treat the actions of the former as being the same kind as the latter, only more complex, we are victims of conceptual misunderstanding.

This Winchian criticism of method fits the criticisms that Hart has already filed against Austin's position. Thus, this criticism of Austin that goes on at the level of philosophy of social science gives even more weight to the direction of Hart's arguments against the Command Theory of Law.

Both Austin and the Rule Sceptic attempt to give an account of law from a position that has an external point of view; consequently, their account of the bindingness of law is explained not in terms of the attitudes of the individuals in the legal society, but in terms of the predictive possibility of peoples' actions. Hart can illustrate the absurdity inherent to Rule Scepticism in the same

way he showed the absurdity involved in the Command Theory of Law.

In the case of a draft dodger we would ordinarily think his case falls under the law, regardless of how he evades getting drafted. But a theory using coercion as the binding element cannot hold this. Consider the case of the draft dodger who bribes military officials so that they delete his name from the recruiting list and then leaves the country. According to the prediction account of how law binds individuals, the evader's case would fall under the law prior to him bribing the officials and his leaving the country -- for there is a possibility that he will be found out and punished. After bribing the officials the evader's case would not fall under the law. There is no way that the legal authorities will find out that he did not report for military service; consequently, there is no possibility of his being punished. In order to dissolve the dilemma between the predictive theory and common sense we must emphasize that mere considerations of punishment for non-compliance fall out as irrelevant as a binding element in law. The theory must be given up since ordinary men and judges hold that the evader's case falls under the law regardless of how he evades getting drafted -- to think otherwise would be inconsistent with the principle of "treating like cases alike".

This leaves rules and obligation as the only possible elements that bind individuals to follow legal standards.

Hart explains their function as follows: by accepting a rule of an institution we are obligated or bound to follow that rule, whether it be a rule in a game or a law -- if the rules are not followed the practice ceases to be (C.L., 141). According to Hart's analysis of the binding nature of legal rules both of the draft dodger cases fall under the law since both cases fall under a rule -- this is consistent with the principle "treat like cases alike".

Rule Scepticism's extreme emphasis on the open-texture of statutes and gaps in the law and the rejection of rules, consequently bringing about a rejection of legal obligation, places itself in the absurd position of conflicting with the fundamental axioms of justice. Unable to find a plausible alternative to rules as a source of status for judicial discretion, the Rule Sceptic must concede that rules exist. But this is done only at the cost of having its claim regarding "what the courts say is law" undercut, for rules by necessity are essential for giving judicial discretion its status.

Whereas the Rule Formalist position was characterized as freezing the judicial state of affairs, thus indicating that all decisions are certain and determined, Rule Scepticism can be characterized as depicting the judicial state of affairs in total flux, which indicates that all decisions are uncertain, even the outcome of core cases can only be predicted.

Hart's doctrine of precedent and adjudication is a mean

between the two extreme and problematic theories which takes the valid points of each to dissolve the problems of the other. Epistemology indicates that the only way to characterize precedent and adjudication is to apply the Rule Formalist characterization to core cases, and the Rule Sceptic characterization to hard cases. Hart's doctrine of precedent and adjudication is characterized by depicting the state of affairs in adjudication as changing at the boundary (the uncertainty that exists in hard cases) and as depicting the familiar ground as shifting relatively slowly (the certainty that exists in core cases). This synthesis and the resultant position places Hart in the line of Dworkin's attacks. In the next chapter these attacks will be examined.

CHAPTER TWO

A RESPONSE TO MODEL OF RULES I

Section 1: Introduction

Dworkin's major criticism of Hart in Model of Rules I (T.R.S.) is that a single formal criterion of identity is incapable of accounting for all types of valid standards that are found in a legal system -- more specifically, no rule of recognition is capable of designating the proper weight belonging to principles found in law. The disagreement between Hart and Dworkin is sparked off by a disagreement over the following question: "Can the validity of a legal rule be adequately depicted by its form, or is it the content that makes it a valid legal rule?"

As we have seen, Hart follows the legal positivist tradition. Adhering to the separability of law and morality, Hart takes the view that legal validity is cashed out in terms of the form or pedigree of the rule. According to Hart the content or merit of a legal standard does not determine its validity. Hart's reasons are that there are iniquitous laws in legal systems and that a criterion of validity that involves morality would distort the notion of legal validity. According to Hart, the morality of a legal rule is associated with the efficacy of the rule. If the rule has bad consequences then it will be repealed due to the lack of acceptance shown by the members of the legal system. (C.L., 100). Furthermore, Hart notes morality also enters the law via legislation or piecemeal via adjudication in hard cases.

Dworkin, contrary, to Hart, sides with the Natural Law

tradition and views questions regarding the validity and the morality of a legal standard as ultimately one and the same question -- the validity of a legal standard is ultimately determined by its content which discloses whether the legal standard is morally acceptable. 'Moral' is used in the following sense: principle X is moral if it is consistent with most of the principles in a judge's theory of political morality. This definition of morality is distinct from the Devlinian notion of morality which holds that 'morality' merely refers to the moral convictions that the judge may possess (cf. T.R.S. Ch. 10).

To give weight to his position, Dworkin introduces a new distinction to the Hart/Dworkin dispute -- the distinction between rules and principles. By showing that adjudication operates on not only rules but on principles which due to their logical features defy being captured by a criterion of identity, Dworkin thinks that he has formulated a crucial counter-example to Hart's rule of recognition.

The distinction between rules and principles is illustrated by citing two precedent-setting cases from American law, although Dworkin notes that choosing any case would do the same task (T.R.S., 23). The first case cited is Riggs v. Palmer.[3] The court was faced with the following decision: "Should an heir named in the will of

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3. 115 N.Y. 506, 22 N.E. 188, (1889).

his grandfather inherit under the will, even though he had murdered his grandfather to do so". On the basis of a standard other than a rule the court decided that the murderer should not receive his inheritance.

> All laws as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. (4)

The decisive principle in Riggs that "no one may benefit from his own wrong doing" was formulated as being a legal standard. This standard, however, passed no Hartian test of pedigree. Therefore, for standards to play a role in judicial decisions it is not essential that they be from positive law. In Dworkin's second illustration Henningsen v. Bloomfield Motors Inc.[5], principles not passed via legislation are also cited as reasons for the court's deciding to enforce a contract limiting the liability of an automobile manufacturer for defective parts.

> In a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers, and the public, the manufacturer is under a special obligation in connection with the construction promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly. (6)

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4. 115 N.Y. 511, 22 N.E. 190, (1889).

5. 32 N.J. 358, 161, A2d. 64 (1960).

6. Ibid. at 387, 161 A2d. at 85.

Dworkin distinguishes rules and principles on a logical basis. Although rules and principles belong to the same species (social norms) they differ in the degree of the scope of the class of acts prescribed. Rules are narrowly defined. Legal rules not only contain a reason for an action; they also state the particulars of the circumstances that the prescription of the rule applies to. Rules are also non-contradictory, the reason being that they apply in an all or nothing fashion. Only one relevant rule applies to a case, thus ruling out competing reasons in the completed decision. On the other hand, according to Dworkin, principles are open-ended and do not specify the circumstances that the prescriptions apply to -- the means of application (circumstances that indicate which case falls under which principle) is some how supplied by the judge.

Principles play a central role in Dworkin's theory of adjudication. As was stated in the previous chapter, Dworkin is a Rule Formalist and consequently advocates a type of mechanical jurisprudence which leaves no room for judicial discretion. According to Dworkin, principles take over when rules run out. In cases defying adjudication by rules, the problem of gaps and vagueness that the judge faces are solved by the general prescriptions supplied by principles in a theory of political morality. Thus, judicial discretion is made obsolete -- principles solve all the problems that judicial discretion was postulated to account for. If the notion of principle is sound and if

Herculean theorizing which uses principles, is plausible, then all decisions are certain.

The motivation underlying Dworkin's criticism is that Legal Positivism is defective due to its neglect of principles; this problem has its origins in over-emphasizing rules. Furthermore, Dworkin believes that if his argument is sound the two corollaries of the criterion of identity thesis: the Limits of Law Thesis and the thesis regarding judicial discretion, will also be shown to be false. Thus it appears that the ball is now in Hart's court. Hart or his followers must either give an account of principles that is consistent with the major tenets of a model of rules view of law or undercut Dworkin's arguments for the use of principles adjudication.

Section 2: Raz's Counter-Attack

In Legal Principles and the Limits of Law (L.P.L.L.) Raz defends the fundamental positivist tenet that the law of a community is distinguished from other social standards by some test in the form of a criterion of identity (the Separability Thesis). A corollary of this tenet is that there is a limit to law. If there is a test that distinguishes legal and non-legal standards, there also exists a boundary (limit) which distinguishes the two types of standards. Raz establishes this corollary by implementing two strategies. Both strategies are formulated in response to Dworkin's criticisms of Hart in Model of Rule I. The second strategy is contingent on the first: "if the limits

of law thesis is sound, there must be a criterion of identity which sets necessary and sufficient conditions satisfaction of which is the mark that a standard is part of the law (L.P.L.L., 851). This is a positive strategy. It centers on giving a plausible account of a test which cannot only account for rules but also for Dworkin's principles.

Raz reconstructs Dworkin's attack on legal positivism as follows:

1) The law includes some principles as well as some rules (both being binding). Furthermore, due to the principle's generality it defies being captured by a criterion of identity.

2) The courts never have discretion in the strong sense -- binding principles cover all cases. From 2 Dworkin concludes 3.

3) The thesis of the Limits of Law is wrong. Raz's rebuttal consists of pointing out that although 3 does follow from 2, 2 does not follow from 1 as it stands. 1 requires a modification if it is to threaten the limits of law thesis; however, any modification will be wrong (L.P.L.L., 843).

The necessity of modifying 1 becomes evident once we consider that "some principles" implies that some other principles are non-legal principles. This presupposes a limits of law thesis, and consequently, a criterion of identity. Dworkin's unmodified first thesis leaves the

positivist thesis regarding judicial discretion and the limits of law unscathed. Dworkin could defend the unmodified first thesis by emphasizing that by some principles he means principles of political policies or goals -- those principles that are relevant to judicial decisions. If this defence is consistent with the fundamental theses of Dworkin's theory of law it severly undercuts judicial discretion in the strong sense, for all principles relevant to a judicial decision would be binding if and only if they are relevant to a judicial decision. But how does one decide which principles are "relevant to a judicial decision?" Dworkin again unwittingly presupposes a version of the limits of law thesis. His only alternative is to say: non-relevant legal principles are just as binding as legal principles -- all principles are part of law.

For Dworkin's attack on the fundamental tenets of positivism to be challenging he must establish the strong claim that "all social norms are automatically (without prior legislation or judicial recognition) binding as law, given that they do not conflict with laws created by legislation and precedent" (L.P.L.L., 849). If this tenet is sound judicial discretion in the strong sense is impossible, for all decisions would be bound by some principle. Consequently, the limits of law thesis would be false. The principle that the judge is bound to use in making a decision are co-extensive with the social norms of a particular society in which the legal system exists.

For Raz to disarm Dworkin's arguments it might appear that he has to directly undercut the major tenet (1) from which the two corollaries (2) and (3) follow. The reason for this route is that the corollaries have their validity dependent upon the major tenet -- not vice versa. Raz however, places little effort in this strategy and attempts to show that even though (1) was true, it implies, not (2), that judicial discretion is false, but the opposite of (2) (L.P.L.L., 843-51). He does this by showing that legal principles do not exclude judicial discretion, rather they presuppose its existence and direct and guide it. Raz argues for this by citing three different sources of judicial discretion which are related to the application of principles.

i) Vagueness is inherent in language (L.P.L.L., 846). Principles and rules of interpretation can sometimes solve problems of vagueness leaving no room for discretion. But when applying principles discretion is necessary, for principles (being expressed in language) are also subject to vagueness.

ii) Rules unlike principles have their weight determined by law. Although the law dictates what considerations (principles) have to be taken into account, the weight assigned to each of them or to the actions in accordance with or contrary to each of them in a particular case is not given. The weight attributed to principles is decided by exercising judicial

discretion. The scope of discretion is in fact doubly extended, since not only must the relative importance of principles be determined, but also the importance relative to each principle in relation to deviating from it and following it on a particular occasion.

iii) Most legal systems grant judicial discretion not only in assessing the weight of principles but also to act on considerations not legally binding i.e. in a case not covered by existing precedent (casus omissus). Principles do not dictate considerations. Principles guide judicial discretion by merely limiting the range of considerations. For instance, "the courts will not enforce unjust contracts" and "public corporations should act for the general good" are principles that only generally state what considerations should be acted on; the cases they apply to are not specified, and judicial discretion is required for this. What is "unjust" and "for the general good" is determined by the judge using his discretion (what feels appropriate) when he is instructed by the law to do so.

These three arguments allow Raz to conclude that Dworkin's denial of judicial discretion, which in turn is used against the limits of law, must be rejected.

Dworkin's tenet (1) regarding "the use of principles and the inability of a formal criterion of identity to capture them" could also be undercut by providing a criterion that would sufficiently distinguish moral and

legal principles and the type of obligation associated with them. If this criterion were possible, Raz and Hart would be in a position to set the limits of law on the basis of inherent differences between moral and legal principles.

Section 3: Attack on Dworkin on the Grounds of Philosophy of Law

Raz's second strategy endeavors to establish such a claim by providing a criterion of identity which serves as a necessary and sufficient condition of a legal standard. This strategy is a positive argument for the plausibility of the limits of law notion. In light of Dworkin's criticisms of Hart's rule of recognition, Raz sees the necessity of modifying the rule of recognition in order to account for principles.

Raz agrees with Dworkin and sees that the distinction existing between legal rules and principles is a logical distinction (L.P.L.L., 824). Rules prescribe specific norm acts. The roles of rules and principles are distinguished by the scope of reasons they provide in a judicial decision. Since we justify considerations which apply to a limited range of situations and actions by more general considerations, principles can be used to justify rules, but not vice versa (L.P.L.L., 830). Raz goes on to say, in opposition to Dworkin, that principles presuppose rules in that they are mere summaries of reasons given in rules. Some principles may be binding on judicial decisions but not all. It is a thesis of Hart's that not only is legal obligation a necessary element of a legal system but must

also be a necessary element in any adequate theory of law. There are cases where there are no binding standards that give reasons in a decision of a case. In these cases the judge is bound to use discretion in the strong sense. This is not to say that the decision is sheer caprice for the judge is bound to use his discretion and he justifies his decision by invoking some general reasons (L.P.L.L., 847).

Dworkin's first criticism emphasizes the following: the rule of recognition is the criterion of identity for law in that the laws that follow from it are valid. Since validity is an all or nothing concept appropriate to rules it is inconsistent with the dimension of weight that principles possess; consequently, the rule of recognition cannot account for principles. Raz, seeing this, attempts to account for legal principles in terms of acceptance. The rule of recognition is a judicial custom; it is accepted by a group of people in a society sharing the same form of life. Principles, unlike the rule of recognition, are a judicial custom that acquire their status by the judiciary in a series of cases. Although the rule of recognition serves to explain the legal status of general community customs (legal rules that are binding) it cannot explain in the same way the legal status of other judicial customs. Thus, Hart's simple notion of one customary rule of recognition and the law recognized by it, must be modified to include all customary principles of a legal system and all the rules that follow from them. This

modification is consistent with positivism's fundamental tenet, namely, law is an institutionalized (rules are enacted) normative system (members have an internal point of view towards the rules) and the fact that the enforcement of these standards is a duty of special law enforcement agencies is an important feature which distinguishes it from any other normative system (L.P.L.L., 853).

Dworkin's second argument against the formulation of an adequate criterion of identity is a rejection of not only Hart's version of the thesis but all versions, even the above view of Raz. The argument consists of the following:

1) The only way for a principle to acquire legal status is if adequate institutional support can be discovered.

2) It is impossible to devise any formula for testing how much and what kind of institutional support is necessary to make a principle legal.

3) It follows that it is impossible to provide a general account of the differences between legal and non-legal standards; consequently, the thesis regarding the limits of law is false.

Raz, therefore, defends his proposed criterion of identity by attacking Dworkin's second premise. This is done by giving an adequate account of judicial custom. This in turn is accomplished by giving an explanation of the concept of a social norm. Hart gives an account of social

norms in terms of an internal point of view or how the norm functions in the lives of the members of the community. A rule is a social norm if and only if:

1) It is accepted by the members of the community.

2) The members use the rule as a means of criticizing and justifying behaviour.

3) The behaviour prescribed by the rule is enforced. (C.L., 86-88).

To aid Hart and Raz one could further elucidate the notion of the weight of legal principles by providing the following formula a principle is binding on a decision of a case or has more weight than any other competing principle when:

1) The principle is a deciding factor in most of the cases similar to the case at hand. The principle is more coherent than any other principle in the existing legal system.

2) The acts referred to in the principle must correspond to the states of affairs in the case in order for the case to fall under the principle. If either the coherence or the correspondence considerations are left out of the formula for the bindingness of principles, principles cannot be applied. The question of the justification of a principle is distinct from the question pertaining to its bindingness. The justification of a principle in a decision must be explained in terms of correspondence.

Section 4: Attack on Dworkin on Epistemological Grounds

There is very little direct attack on Dworkin's fundamental tenet regarding the judicial use of principle. I would like to formulate an argument that undercuts the importance and the plausibility of the use of principle in adjudication. To establish the importance of the use of principle, Dworkin must establish that principles function differently from rules. This involves defending the Dworkinian presupposition central to the Hart/Dworkin dispute: "Principles are epistemologically more basic than rules". According to Dworkin, and contrary to the Positivists, principles are more than mere summaries of the reasons given in rules, for rules ultimately derive their validity from principles.

In order for principles to play the role of maintaining certainty in hard cases (where traditionally the application of rules is taken to be uncertain) it is necessary that they have an epistemological element not possessed by rules. Dworkin's program of mechanical jurisprudence succeeds only if in fact this extra element exists and is not merely assumed by Dworkin. The extra element principles must possess must be related to their application; Dworkin's use of "weight" supposedly captures the element of application. The fact that principles can be mechanically applied to supply general reasons for deciding a particular case while at the same

time maintaining stare decisis indicates that principles supply the means to their own application. The application of a principle involves specifying remote considerations to the particulars characterizing the case before the judge. The reason for principles specifying the conditions of their application is that like rules their application is not immune to mistake and question -- it is possible that the judge could apply an inappropriate principle. A characteristic feature of principles is that, unlike rules, principles can conflict. Principles can compete when the judge is constructing a decision. For example, in a hard case involving a consumer complaint regarding product 'X', there may exist principles supporting the plaintiff and the defendent. A concrete example of a case involving competing principles is found in Dworkin's own example: Henningson v. Bloomfield Motors, Inc. The judges in this case had to decide whether or not the auto manufacturer's liability could be extended from mere liability for defective parts to liability for medical and other expenses of persons injured in a crash. Note in the quote that (a) - (b) support the manufacturer's claim of restricted liability; that (c) - (f) support the plaintiff's claim that the liability be extended:

> At various points in the court's argument the following appeals to standards are made:
> (a) 'We must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.'
> (b) 'In applying that principle, the basic

> tenet of freedom of competent parties to contract is a factor of importance.' (c) 'Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned.' (d) 'In a society such as ours, where the automobile is a common and necessary adjunt of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly.' (e) '"Is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?"' (f) '"More specifically the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of other ...."'
> (T.R.S., 24)

Furthermore, there may be competing principles that support various rights either litigant may possess.

The problem that the judge faces in a hard case is to determine which of the principles apply to the particular case. The problem is made more difficult once it is revealed that there are no other binding standards that guide the judge in choosing the appropriate principles. But principles themselves were postulated by Dworkin as the ultimate guides for judges when rules were found to be indecisive to a decision -- principles are the ultimate epistemological source in adjudication. Thus, Dworkin is forced to postulate yet another judicial element to solve the problems that his first solution has created.

For Dworkin, principles containing general considerations must also, like precedents, possess the conditions that make their application relevant to the particulars that characterize the cases at hand. This characterization of principles leads Dworkin into a dilemma. One characterization views principles as general considerations, but in order to account for their application they must be characterized as being specific. By definition principles can only have the feature of open-endedness, for principles were formulated to bridge the gap between hard and core cases by providing general or umbrella reasons which would cover cases not captured by the specific reasons given in rules. However, we must keep in mind that principles are uneffective if they lack the specificity essential for their application. Although both characterizations are necessary for Dworkin's use of 'principle' they conflict with each other. For Dworkin, principles have <u>both</u> the features of generality or open-endedness that allows them to cover a great variety of cases differing in specifics <u>and</u> the feature of specificity that enables the judge to apply the principle unproblematically to particular cases.

The problem Dworkin faces with principles is that, although the notion of 'principle' was formulated in order to solve the enigma faced by judges when the application of a rule was uncertain, judges face the same problem at the level of principles. Dworkin's most likely response to the problem is to say that the application of a principle

to a particular case is determined by how consistent the principle is to other principles in a theory of political morality. Articulate consistency states that all responsible judicial decisions are justified if they cohere with each other in some theory of political morality. This response is also problematic. Although the coherence requirement is an important consideration in adjudication it is of no help to the judge faced with the problem of determining whether the reason given in the principle is applicable to the facts found in a particular case -- the consideration emphasized by the advocates of judicial discretion. For the coherence test to be of any help here, the theory of political morality would have to contain all the factors found in the case. Given this, the judge could determine the association, if any, that existed between the principle and the case. Dworkin's response is implausible. Judges do not have the ability of acquiring all the relevant factors of the cases under consideration at their disposal. Dworkin could reply that Hercules would have this ability. But this reply begs the question regarding the indeterminacy of aim and lack of facts which are the real characteristics of adjudication.

Another response to the application problem would be to say "when the application of a principle is in question, a higher principle can resolve the dispute". But this strategy involves the same tendency that moved Dworkin to postulate principles when rules run out. There is an

absurdity involved here. With greater generality (principles) there is also less contained in them that could aid in giving a decisive judicial decision. For example, in the hard case where the principle "criminals should not benefit from their own wrong doing" has an application that is in question, what higher principle could aid the judge in applying it to the case?" -- "Be moral"? This is more contentless than the first principle, and consequently, could not aid the judge. The point about the lack of content leads to a second point: the reasons cited in principles due to their generality can only be understood in the context of a case where the more specific reasons are brought out. For example, the principle that "criminals should not benefit from their own wrong doing", in the context given in Riggs v. Palmer, is only applicable after the specific reasons regarding wills, inheritance and murder, and their association has been understood. But once these reasons have been associated, the question of whether the murderer should receive the inheritance will be solved on the basis of these reasons alone -- the principle is superfluous from a purely epistemological point of view.

The hidden point that these arguments bring to surface is that "Legal reasoning is always from particular to general reasons; the ultimate appeal is to the instances and the relationship". In the practical problem of determining the application of a legal

standard, it is epistemologically impossible to determine the truth-value of the general statement or reason (principle) prior to having the truth-value of some particular statement. Dworkin's view of legal reasoning in hard cases, where the application of particular reasons (rules) is questionable, advocates that the cases fall under a general reason (principle). Dworkin then goes on to say that the case falls under a particular reason contained within the scope of the principle. This is fallacious, for the principle's application to the case is established only firstly by showing that the case falls under the rule, and then after this is established, by being in an epistemological position to determine whether the case falls within the scope of the principle that covers the rule. Epistemologically the relationship existing between legal standards and the particulars of a case (their resemblance) is established by argumentation which is directed from the particulars (facts and reasons) to the general. But once the judge reaches the epistemological level of the principle (the general) he has already determined the relationship he sought to establish -- the relationship is determined by the means that bring the judge to the principle and not by the principle itself. If this argument is sound the Positivist thesis that "principles are merely summaries of the reasons given in rules" has been given more weight. Consequently, the Legal Naturalist counter-thesis that emphasized that "principles are epistemologically superior to rules and the

factor that determines the validity of a rule" has been undercut.

CHAPTER THREE

A RESPONSE TO MODEL OF RULES II

Section I: Introduction

Model of Rules II (M.R. II) is an ammendment of the attack provided in Model of Rules I (M.R. I). M.R. II was prompted by the objections of such critics as Raz (Dworkin, T.R.S., 46-7). In M.R. II the line of attack against Hart takes the form of counter-factual argument directed towards showing that a formal criterion of identity is not even capable of capturing those legal elements that it proposes to account for -- the legal rule. Dworkin's approach here is much more direct than that taken in M.R. I where the argument took the form of showing that a formal criterion of identity could not account for 'principles'.

In M.R. II Dworkin attempts to undercut Hart's fundamental thesis that there is a social rule or set of social rules for law that settles the limits of the judge's duty to recognize any other rule or principle as law. Hart's notion of the rule of recognition serves as a criterion of identity for valid legal rules. His account of legal rules emphasizes the element of 'enactment' that legal rules possess; they follow from a rule of recognition that is accepted as a way of life by some society. The underlying issue that sparks off the disagreement between Hart and Dworkin is again "Can the validity of a legal rule be adequately depicted by its form, or is its form irrelevant, and it is its content that makes it a legal rule?" Dworkin believes it to be the latter, and sees the morality

of a legal rule as ultimately giving it its validity.

Let me restate again Hart's theory. Hart's fundamental thesis is that judicial duty exists only as a social rule exists (a criterion of identity). Two corollaries follow. Firstly, there is judicial discretion in the strong sense (no binding principles, in Dworkin's sense, are relevant to the decision of the case). The reason for this corollary is that judicial discretion is necessary in controversial cases where there is doubt about which legal standards apply to the decision. In controversial cases there is no legal rule recognized by the criterion of law that requires a judge to decide the case in a particular way. The direction of the decision is based on principles of morality or social policy which are chosen by the judge. A second corollary is the thesis of the limits of law. The thesis regarding judicial discretion requires that some standards are legally binding and others are not. This involves the notion of a criterion of identity of law, such as is implied by the first corollary, and the notion that there is a limit to law. For judicial discretion to be possible, legally binding standards must come to an end; there are cases that are not covered by existing legally binding standards and can only be decided by appeal to extra-legal considerations.

Dworkin attempts to disarm all three theses by rejecting the fundamental thesis from which the two corollaries derive their validity. This endeavour takes the form of

showing that neither Hart's social rule theory, nor any modification of it, can adequately account for judicial duties and legal rights. Dworkin's summary of the social rule theory places Hart in a very weak position where the theory can only account for conventional morality that is non-controversial.

Given that Dworkin's summary of Hart's social rule theory is correct, his criticisms go through without a hitch. But Dworkin's summary of the social rule theory begins by misrepresenting Hart's theory in several fundamental ways. Furthermore, the bulk of Dworkin's criticisms of the three theses turns on these opening mistakes. For this reason Dworkin's entire endeavour is ineffective.

Dworkin's opening mistake is his failing to emphasize Hart's internal point of view; consequently, he sees social rules as constituted by mere convergent behaviour. Viewing social rules in terms of behaviour leaves one unable to draw a distinction between rules and habits. This behaviourist rendition of Hart leads Dworkin to view the status of Hart's statements about social rules as descriptive. Consequently, Dworkin concludes that the social rule theory can only account for conventional rules for only they require observable convergence or agreement in opinion in order to exist.

In fact, Hart is not concerned with "agreement in opinion"; rather the concern lies with a fundamental "agreement in judgment". Hart's social rules are constituted by

agreement in judgment and are presupposed by any type of rule that Dworkin is concerned with; in ignoring this, Dworkin misses the whole notion of what Hart takes a social rule to be.

Section 2: What Hart Really Believes

In order to disarm Dworkin's attack of Hart's social rule theory it is essential that we give an account of the theory that adequately represents Hart's intentions. To do this we must look at Hart's account of obligation as it is laid out in The Concept of Law. Here Hart attempts to answer the question: "Under what circumstances do judicial duties and legal obligations arise?". Hart's answer may be summarized in the following way. Duties exist when social rules exist providing for such duties. Such social rules exist when the practice conditions for such rules are met -- practice conditions constitute social rules. These practice conditions are met when the members of the community:

> 1) Accept the practice in the form of any particular form of life or common activity in which men may engage in together. The individuals of a community agree not in opinion, but in forms of life. Such agreement is not made by explicit choice as is the case in conventional morality; rather it is made by natural necessity (at least for the most fundamental provisions). If it is given that survival is the aim of all men, then law and morality by natural

necessity must have a content which aids survival:

1') It is a truism that men are vulnerable to attack; it necessarily follows that there are rules forebearing the free use of violence.

2') Since demand is greater than supply, contracts are needed to regulate supplies. This involves rules prescribing the use and formulation of contracts.

3') Since men have limited altruism, a system of mutual forebearance is necessary and possible.

4') Approximate Equality; no individual is so powerful that he is able without cooperation to dominate or subdue others for a short period. This truism necessitates a system of mutual forebearance and compromise which is the basis of both moral and legal obligation.

5') Limited understanding and strength of will; prudential calculations dictate that following the prescriptions of rules regarding respect for persons and property is more beneficial than a policy of non-co-operation.

2) Another practice condition is that the rule is referred to as a justification of behaviour (C.L.,82). The rule is also referred to when criticizing behaviour that deviates from behaviour prescribed by the rule. Rules account for meaningful behaviour. If an individual deviates from what the rule prescribes he can only justify his action if he refers to some

over-riding rule that conflicts with the rule broken. Reasons that are not given in terms of rules do not count as good reasons.

3) The final condition required for a social practice to exist is that the rule must be enforced. If the behaviour prescribed by the rule is not enforced the practice ceases to exist. The enforcement of moral and legal rules function on different bases. Moral rules are backed by sanctions that remind the individual of the moral character of the act comtemplated and the demands of morality. On the other hand, legal standards involve arguments consisting of threats of physical punishment or unpleasant consequences to dissuade an individual from breaking a legal rule.

These three conditions serve as necessary and sufficient conditions for the existence of a social practice. They also constitute what I shall call "the internal attitude" towards it. The internal attitude serves as a basis of division that enables Hart to distinguish rules and habits, and, consequently, allows him to distinguish obliged and obligated. The actions resulting from a habit of obedience and a rule that prescribes behaviour that is binding are similar in the sense that human conduct is made non-optional (C.L., 80). But habits of obedience differ from rules that govern behaviour with respect to the motives and beliefs with which the relevant actions are done. Habits of obedience are established by threats of punishment

accompanying deviation from what is ordered in the command. We are coerced to act in accord with what the command specifies. Thus, we are obliged to follow the command backed by threats. On the other hand, following a rule does not involve being obliged. We are under an obligation to do, or to forebear from doing the acts prescribed by a rule. The justification for following a rule is given in terms of the rule itself. When justifying a closure move in a game of chess one cites the rule prescribing closure; "When the opponent is placed in check it is a checkmate and the game has terminated". Obligation requires an internal attitude towards the rule prescribing non-optional behaviour. Both rules and habits involve convergent behaviour. But whereas convergent behaviour is a sufficient condition for the existence of a habit it is not a sufficient condition for the existence of a rule. A habit requires that people have regularity in their behaviour. It is a habit to go to the tavern on Saturday night, since people go to the tavern every Saturday night (C.L., 54). But the convergent behaviour resulting from following a rule and carrying out a duty whenever one's case falls under the rule, is merely a consequence of having an internal attitude towards the rule prescribing the duty.

We cannot account for meaningful behaviour in terms of habits or convergent behaviour. For instance, when confronted with the problem of a certain kind of fake in a chess game, examining the behaviour is insufficient to

distinguish the chess player from the fake. The fake may, after watching several games of chess, move the chess pieces in the same way that the player does, and may even, by luck, win the game. On the basis of empirical verification we would be forced to conclude that the fake and the player cannot be distinguished. But on questioning the fake about the reasons for his moves and why the game was concluded, all that he could reply is that "I made my moves in conformity with the behaviour that I saw in the game previous to the one I played". The fake was not playing chess. He was merely moving wooden objects about a checkered board in conformity with behaviour he had previously noted. The only way we could distinguish the fake from the player would be to ask him to cite the rules that allowed him to make his moves. The player would past this test, for he has an internal attitude towards the rules of chess. He would justify the moves he made by referring to the rules. The fake does not follow the rule as the player who accepts the rule does; rather his behaviour merely accords with what the rule prescribes. Consequently, the fake or the person who views life as something that is understood only on the basis of avoiding punishment; he justifies his behaviour in terms of the predictive possibility that his actions are not mistaken on the grounds of the previous observed behaviour in the other similar instances. This is sufficient reason for exposing the fake as a fraud who does not know how to play chess -- or the bad man as one who

mimics legal behaviour.

From what has been said about the acceptance of a social practice being necessitated by nature, and how convergent behaviour is only a consequence of following rules, the status of Hart's statements about social rules cannot be purely descriptive. If they were, acceptance could only be given in terms of convergent behaviour. As a consequence, Hart would be unable to distinguish rules and habits or obliged and obligated, and furthermore he could not account for meaningful behaviour. In order to interpret Hart's social rule theory properly, that is, in a way that satisfies his intentions, we must say that the status of Hart's statements about social rules are conceptual or metaphysical. This is made evident by Hart's distinction between the internal and the external points of view which is presupposed by his distinction between the internal and the external attitudes towards rules. A physical scientist such as a physicist takes an external point of view towards the phenomena that he is studying. The physicist merely notes the regularities exhibited by the motions of the objects and attempts to explain their causes. The status of his statements are purely descriptive. On the other hand, the sociologist studying human interaction in a society cannot explain meaningful behaviour purely in terms of empirical statements. Rules cannot be explained in terms of mere convergent behaviour, for on this analysis rules cannot be distinguished from habits. In order to explain

how rules function in the lives of human beings, one must take an internal point of view. This involves explaining social phenomenon in terms of a priori conceptual analysis. Hart's analysis in terms of rules provides a framework for giving an account of meaningful behaviour. But he does this only by making some ontological commitments.

Hart's view of social rules can be summarized as rules being instruments of policy aimed at solving social problems -- rules are techniques of social management. Legal rules fulfill the following functions: grievance-remedial instruments, instruments ordering governmental conferral of public benefits and instruments for facilitating and effecting private arrangements. Hart, contrary to Dworkin, believes that social rules are a means to an end, as opposed to absolutes which prescribe rights and duties while existing outside of a social practice. Fundamental rules of social management are accepted via natural necessity. Consequently, they are not chosen deliberately on the basis of opinion as conventional rules are. Hart's notion of acceptance refers to something more basic than opinion. It is concerned with acceptance in judgment, which agreement in opinion presupposes. Wittgenstein in the Philosophical Investigations elucidates this notion of acceptance in the passages 242 and 241:

> 242. If language is to be a means of communication, there must be agreement not only in definitions, but also (queer as this may sound) in judgments. This seems to abolish logic, but does not do so -- it is one thing

> to describe methods of measurement. But what we call "measuring" is partly determined by a certain consistency in results of measurement.
>
> 241. "So you are saying that human agreement decides what is true and false?" It is what human beings say that is true and false; and they agree in the language that they use, that is not agreement in opinions but in forms of life.

Agreement in a "form of life" constitutes agreement in judgments such as what is true and false and what is right and wrong. Conventional moral rules are instruments of policy for specifying what acts are right and wrong. They are allowed to do this because they have their status dependent upon agreement in judgment of what is right and wrong. Just as statements about obtaining measurements and the results of measurements have their status based on a particular method used for measuring, statements about conventional moral rules have their status dependent on agreement in judgments about what is right and wrong.

Section 3: What Dworkin Says Hart Believes

Since the soundness of Dworkin's attack on the social rule theory turns on his summary of the theory, it is essential that we reconstruct Dworkin's rendition of the theory. After this is completed we will be in a position to criticize any misinterpretations Dworkin may have made. Dworkin summarizes Hart in the following way. Hart answers the question, "Under what circumstances do duties and rights exist?", by saying duties exist when a social rule exists; a social rule exists when the practice conditions

for such rules are met. He goes on to say that the practice conditions are met when "... the members of the community behave in a certain way; this behaviour constitutes a social rule, and imposes a duty" (T.R.S., 49). Dworkin interprets mere convergent behaviour to be a sufficient condition for the existence of a social practice. This is also made evident by Dworkin's characterization of the internal attitude towards a rule. The practice conditions for a duty imposing rule are met, for example, when a group of church-goers follow this practice:

> ... (a) each man removes his hat before entering church; (b) when a man is asked why he does so, he refers to the rule that requires him to do so; (c) when someone forgets to remove his hat before entering the church, he is criticized and perhaps even punished by others.
> (Dworkin, T.R.S., 50)

Dworkin goes on to say that Hart's analysis is applied to the case of judicial duty in the following way:

> ... (a*) regularly apply the rules laid down by the legislature in reaching the decision; (b*) justifies this practice by appeal to 'that rule' that judges must follow the legislature; and (c*) censure any official who does not follow the rule.
> (Dworkin, T.R.S., 50)

Both (a) in the church-goer case and its analogue (a*) in the law example imply that acceptance of a rule is cashed out in terms of mere convergent or regular behaviour that all individuals who follow the rule exhibit. After establishing that "acceptance" is mere convergent behaviour, Dworkin allows himself to go on to say that Hart's social rule theory can only account for rules of conventional

morality. The reason is that the fact that agreement in opinion is an essential part of the grounds for asserting a rule.

> If church-goers believe that each man has a duty to take off his hat in church, but would not have such a duty but for some social practice to that effect, then this is a case of conventional morality... A social rule would be constituted by this behaviour ... people on the whole would not lie, they would cite 'the rule' that lying is wrong as a justification of this behaviour, and they would condemn those who lie.
>
> (Dworkin, T.R.S. 53)

By "the church-goers believe" Dworkin implicitly means that the church-goers are in agreement in opinions and they have come to agree via overt choice. In the same move Dworkin rules out the possibility of the social rule theory depicting "concurrent rules of morality", for agreement in opinion is not an essential part of the ground for asserting rules of concurrent morality.

> A community displays a concurrent morality when its members are agreed in asserting the same or much the same, normative rule, but they do not count the fact of the agreement as an essential part of their grounds for asserting the rule.
>
> (Dworkin, T.R.S., 53)

Consequently, Dworkin goes on to say that Hart's analysis of social rules misrepresents rules of concurrent morality:

> But it would distort the claim that the members of the community made, when they spoke of a duty not to lie, to suppose them to be appealing to that social rule, or to suppose that they count its existence necessary to their claim. On the contrary, since this is a case of concurrent morality, the fact is they do not. So the social rule theory must be confined to conventional

morality.

(Dworkin, T.R.S., 53-4)

Dworkin attributes to Hart's analysis of social rules the status of being merely descriptive. If the existence of a social rule is constituted by mere convergent behaviour, its existence is simply a matter of fact (T.R.S., 50). Dworkin's belief that Hart's statements about social rules are descriptive is made more evident by the following passages:

> ... we cannot say that the social rule is uncertain when all the facts about social behaviour are known ... because that would violate the thesis that social rules are constituted by behaviour.
>
> (Dworkin, T.R.S., 54)

> ... the social rule theory might retain Hart's original definition of a social rule, as a description of uniform practice.
>
> (Dworkin, T.R.S., 56)

and again at page 54 T.R.S.:

> ... Hart's description of the practice conditions for a social rule is explicit on this point: a social rule is constituted by conforming behaviour of the bulk of the population.

This summary of Hart places him in the position of the natural scientist who merely notes empirical regularities in behaviour. Consequently, this summary attributes Hart a position involving a purely external point of view.

Section 4: Dworkin's Criticisms

After providing this summary of the social rule theory Dworkin then allows himself to go on to attempt to refute its claim to account for all duties. Dworkin structures

his attack by implementing a two-fold strategy. Both strategies presuppose the disagreement or uncertainty in opinion as it is depicted by the lack of convergent behaviour is enough to show that a social rule does not exist. The first strategy attempts to lessen the scope of the social rule theory by showing that it cannot account for concurrent moral rules and moral reforms. The strategy aims at forcing Hart to take a weaker version of the social rule theory which can only account for some duties, namely, those prescribed by conventional morality. To accomplish this, Dworkin offers a counter-example to the above principle involving a vegetarian who argues "... that we have no right to kill animals for food because of the fundamental moral rule that it is always wrong to take life in any form or under any circumstances" (T.R.S., 52). Although no social rule exists to explain the normative rule that the vegetarian is arguing for, it is still correct to say that a duty exists "not to eat meat" and that we may be wrong in not following the rule prescribing that duty. The vegetarian acknowledges that no such social rule is recognized by the majority and attempts will have to be made in order that they accept such a normative rule. Dworkin thinks that the vegetarian case serves as a counter-example sufficient to weaken the social rule theory to the extent that it can only account for duties whose existence the community is by and large agreed upon (T.R.S., 53).

The second strategy attempts to establish that the

social rule theory is not even an adequate account of conventional moral rules. Dworkin believes that this is accomplished by implementing the following type of counter-example: although all the members of a community count a social practice as a necessary part of the grounds for asserting some duty, they may still disagree about the scope of the duty (T.R.S., 54). Dworkin illustrates this type of counter-example with a case regarding church-goers who have a rule that "men must not wear hats in the church", but are divided on the question of whether "that rule" applies to the case of male babies wearing bonnets (T.R.S., 54). The mere fact that there is a division on the question of whether the scope of the rule extends to cover male babies is reason enough to show that neither view can be pictured as based on a social rule (T.R.S., 54). Dworkin goes on to say that this is fatal to the social rule theory for the reason that even in conventional morality people assert normative rules that differ in scope and detail -- people articulate their rules in varying detail (T.R.S., 55). People whose rules differ due to varying elaborations are not appealing to the same rule, even though they may agree in most cases that might arise. Dworkin believes that disagreement about social rules, in the form of disagreement about their existence or their scope, weakens the social rule theory to an unacceptable form, where it must be held to apply only to cases like 'games', where it is accepted by the participants "that if a duty is controversial

it is no duty at all" (T.R.S., 55).

Dworkin notes that Hart may defend the social rule theory by assuming that duties cannot be controversial in principle. But this assumption is sound only if the strong version of the social rule theory is true (T.R.S., 63). In reply to this move Dworkin notes that both versions are shown to be false by the counter-examples (T.R.S., 64). By analogy, Dworkin argues that since the rule of recognition is constituted by general agreement in opinion (as it is depicted in convergent behaviour) it cannot account for judicial duties. The problem of disagreement in a social rule or its scope under-cuts any account of judicial duty given in terms of social rules. Dworkin cites two jurisprudential reasons for this. First, the great bulk of the principles and policies judges cite are controversial in weight. This is evident in Riggs v. Palmer.[7] Secondly, most appeals to principles are appeals to principles that have not been the subject of any established practice. For example, Henningsen v. Bloomfield Motors, Inc.[8] involved the principles that automotive manufacturers have a responsibility to the public, a principle which was never formulated before (T.R.S., 65).

Section 5: Why Dworkin's Criticisms Do Not Work

The bulk of Dworkin's criticisms of the social rule theory turn on fundamental mistakes made in his summary of

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7. 115 N.Y. 506, 22 N.E. 188, (1889).

8. 32 N.J. 358, 161 A2d. 64 (1960).

Hart's account of duty. Dworkin's summary attributes to Hart a view that Hart opposes and whose consequences Hart tries to avoid. Dworkin's summary of the internal attitude towards rules depicts Hart's position as involving an external point of view towards social phenomenon, which makes it impossible for Hart to establish the internal attitude. If a social rule is constituted by mere convergent behaviour which shows that the community is in agreement in opinion, then all that is necessary to show this is observation of behaviour. But it has been shown by my summary of Hart that the internal attitude towards rules presuppose an internal point of view. Hart explicitly states this at page 54 C.L. when he distinguishes rules and habits; both share the feature of convergent behaviour, but whereas in the latter case it is a sufficient condition, in the former case it is merely a necessary condition for a group's having an internal attitude towards a rule. Consider Dworkin's summary and Hart's account of the distinction between rules and habits:

> Hart's description of the practice conditions for social rules is explicit on this point: a rule is constituted by the conforming behaviour of the bulk of the population.
>
> (Dworkin, T.R.S., 54)

> First, for the group to have a habit it is enough that their behaviour in fact converges. Deviation from the regular course need not be a matter for any form of criticism. But such general convergence or even identity of behaviour is not enough to constitute the existence of a rule requiring that behaviour: where there is such a rule, deviations are

> regarded as lapses of faults open to criticism, and threatened deviations meet with pressure for conformity, though the forms of criticism and the pressure differ with different types of rules.
> (Hart, C.L., 54)

Although convergent behaviour is a necessary condition for the existence of a rule, it is besides the point when distinguishing rules and habits -- it is the internal attitude, etc., that is the basis of distinction. The internal attitude a group has towards a rule is the only way of distinguishing a rule from a habit. Contrary to what Dworkin believes, the internal attitude is not cashed out in terms of observable convergent behaviour that reflects agreement in opinion. Rather 'acceptance' is spelled out in part in ontological terms that are involved in giving an account of why the individuals are forced by natural necessity to accept certain instruments of policy which solve problems that occur in social interaction. Dworkin's summary mistakenly takes convergent behaviour to be a sufficient condition of the internal attitude, and consequently, disallows Hart from saying what he actually means.

Consequently, Dworkin's belief that the status of Hart's statements about social rules are purely descriptive, is false. Since the existence of a social rule cannot be constituted by mere convergent behaviour, its existence is not simply an externally observable matter of fact. Hart's notion of agreement does not refer to agreement in opinion that can be noted by observation as depicted in Gallop poll ratings, but agreement in something more fundamental which

Dworkin cannot see, namely, agreement in judgment. Dworkin cannot see this notion of agreement for he misconstrues Hart's notion of an internal attitude. This restricts Hart's account to depicting mere agreement in opinion or conventional morality. In fact, Hart's internal point of view places him in a position of making metaphysical comments about agreement in judgment which are presupposed by any account of conventional morality. 'Agreement in judgment' is spelled out in the Wittgensteinian terms of "sharing a common form of life or activity". In the section dealing with the "Minimum Content of Natural Law" Hart spells out a 'form of life' by commenting on the force of nature to determine the general content of rules necessary for the existence of any society. The content is necessitated by natural truisms about man and the metaphysical assumption that man's goal is to survive.

Since Hart's notion of a social rule does not turn on either agreement in opinion or its manifestation in convergent behaviour, Dworkin's criticisms are false; for Dworkin presupposes this erroneous characterization of Hart, in his attack. The first criticism, emphasizing that the social rule theory cannot account for duties prescribed by rules of concurrent morality, has no weight. Here, Dworkin argues that even though no social rule exists to depict the vegetarian's normative rule "it is wrong to eat meat", a duty still exists. But Dworkin fails to see that the vegetarian case does not count as a counter-example to the social rule

theory. Hart's theory would explain the case in the following way. Both the vegetarian and the ordinary man agree on the fundamental judgment "taking life is wrong". Such a judgment is part of the background morality shared by both in their common way of life. The disagreement existing between them is whether this social rule can be depicted by the normative rule "it is wrong to eat meat". The vegetarian is of the opinion that the social rule "it is wrong to take life" covers the case of taking the lives of animals. In order to prove this, he must give reasons for the similarity between humans and animals which makes the two alike in so far as taking the life of either is equally wrong.

Dworkin's second criticism emphasized that disagreement on the scope of a social rule counted as evidence for the non-existence of a social rule. This criticism is wrong for the same reasons that the first criticism was wrong. Churchgoers who disagree on whether or not the rule "men where upon entering a church must bear their head" covers the case of male babies do not disagree about the fundamental judgment "members of the community must show respect where upon entering a place of worship". Rather they disagree about a conventional rule that has its status based on the more fundamental rule about judgment. Consequently, Dworkin's supposed counter-example about scope does not even address itself to what Hart takes a social rule to be. It is only by appealing to this more fundamental rule, which both parties of the dispute agree on, that the issue can be

resolved. The fundamental rule constitutes an agreement in judgment, namely, that "respect is necessary when entering the church". It stands as a standard whereby conventional rules regarding church etiquette are chosen. The scope of the conventional rule will be determined only by showing which of the two alternatives best promotes the fundamental rule. This is done by both sides citing reasons for why their view of the scope promotes the fundamental rule.

Dworkin misrepresents Hart's social rule theory, and then goes about to cut down a strawman, thinking it is an existing theory of rules. Consequently, Dworkin's attack of Hart's social rule theory leaves Hart's three theses unscathed. Dworkin thinks that the rule of recognition is constituted by mere agreement in opinion as it is manifested in convergent behaviour. This leads him to presuppose that a lack of convergent behaviour indicates rights and duties do not exist. But Hart's internal point of view gives him licence to make metaphysical comments regarding the nature of the agreement in judgment, which is presupposed by agreement in opinion as it is depicted in conventional morality. The rule of recognition is constituted by a form of life which in turn constitutes an agreement in judgment regarding what legal standards consist of. There is no wholesale disagreement about the rule of recognition. But as states of affairs change, the rule of recognition also changes in order for society to run effectively. Only radical changes in the world could change the rule of recognition. For

instance, if men became invulnerable, rules forebearing the free use of violence would not be necessary in order for man to survive, and consequently, the rule of recognition providing for such rules, would also be modified. The rule of recognition changes like a tradition, for it is a tradition. Just as traditions cannot be changed deliberately, the rule of recognition cannot be changed deliberately. Changing them deliberately would be like trying to change the climate deliberately.

CHAPTER FOUR

JUDICIAL ADJUDICATION

PRINCIPLES v. POLICY v. RIGHTS v. GOALS

Section 1: Introduction

Although the Hart/Dworkin dispute has its origins in the basic issue regarding the validity of a legal rule (whether legal validity is ultimately cashed out in terms of a rule's form or its content), it reaches its crescendo at a level of concern where doctrines of adjudication, serving as the end product of their jurisprudential inquiries, are played off with each other. At this level the dispute takes the form of arguing for competing 'bases' of adjudication that are inherent to particular doctrines of adjudication due to the deductive elements that brought them into existence. The two competing bases of adjudication are arguments of policy and arguments of principle.

Dworkin distinguishes arguments of principle from arguments of policy in the following way -- an argument of principle justifies a political decision by showing that the decision respects or secures some individual or group right, whereas arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole (T.R.S., 82). Legal positivists view arguments of policy as an acceptable means of justifying judicial decisions. In hard cases, where no existing settled law can decide the case, the judge is bound to use his discretion in order to decide fairly. The judge may legitimately justify his decision by an argument of policy enacted by the legislature to show that his decision reflects the intentions of the legislature.

An example of a decision justified by an argument of policy would be Lord Denning's decision in Spartan Steel Ltd. v. Martin Ltd.[9] In this case Denning siding with the defendant Martin distinguishes liability for economic loss and liability for physical damages, and sees the defendant liable only for the latter. Denning justifies his decision with the following argument of policy:

> But one thing is clear, the board have never been held liable for economic loss only. If such be the policy of the legislature in regard to electricity boards, it would seem right for the common law to adopt a similar policy in regard to contractors. If the electricity boards are not liable for economic loss due to negligence which results in the cutting off of the supply, nor should a contractor be liable. (10)

Dworkin rules out arguments of policy as a possible category of argument for justifying judicial decisions. Dworkin fears that the arguments of policy may deny rights to one of the disputants in the case. He believes that arguments of policy value the welfare of the community as a whole above the rights of an individual. A claim that is central to Dworkin's position is that judges in ordinary civil cases characteristically justify their decisions through what Dworkin calls arguments of principle, rather than arguments of policy, and that they do not only decide in this way, but should.

In Hard Cases (T.R.S.) Dworkin attacks arguments of policy by examining three arguments against judicial

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9. Spartan Steel Ltd. v. Martin Ltd., 1972 3AER.

10. Ibid at 563.

originality, but all three arguments come short of undercutting the thesis regarding judicial discretion and the use of policy (T.R.S., 84-6). The first argument is that judicial reliance on policies is not consistent with the democractic premise, that policy determinations should be made by a political responsible body. Dworkin argues that since the legislature is responsible to the electorate, they properly make decisions about general welfare, and, being sensitive to the contending political forces, legislatures are better equipped to make such decisions than the courts are (T.R.S., 84-5). The problem with this argument is that Dworkin fails to take into consideration that the legislature does not have the time or the interest to engage itself in establishing rights for every area of common law. Consequently, the legislature leaves gaps between settled law which are filled in by the courts when they decide cases. Nothing in Dworkin's arguments leads us to believe that the legislature could in fact decide questions of general welfare better than the courts. Since the legislature addresses its concern to general questions of policy, it is more likely that the courts which address themselves to particular cases, are in a better position to give a reasoned decision about particular questions of general welfare. But even if the legislature were not suited to deciding these questions, this is no reason for the courts to divorce itself from policies when the legislature does not settle the question of policy. Thus, the

fact that there exists a responsibile legislature does not provide any support to the claim that judges ought not justify their decisions on arguments of policy.

Dworkin's second argument against judicial reliance on policy is that it is unfair for the losing party to suffer because of a fresh policy determination. Dworkin fears that a decision based on policy will possibly deny a right that belongs to the losing party. Policies involve a compromise between individual and community goals and purposes in search of the welfare of the community as a whole. Policy decisions are based on utilitarian considerations and are made through the operation of some political process designed to produce an accurate expression of different interests that should be taken into account. In easy cases where rights are provided for by settled law (concrete rights), policies brought into effect either by legislative change or judicial decision undeniably deny rights, for they conflict with settled law -- individual and public interests are balanced, and consequently, some individual rights are sacrificed. But the legal positivist maintains that arguments of policy are used only to justify discretionary decisions which arise in hard cases. According to the legal positivist, hard cases are uncertain at the outset. Consequently, a decision based on policy could never deny a right to the losing party for no right exists to be lost. In opposition, Dworkin claims that rights are never created but are discovered via Herculean theorizing -- rights exist

at the outset of hard cases. But this reply just goes to show that Dworkin's argument only goes through if the claim that "judges always use principles" has already been shown to be true. Consequently, the retroactivity argument is not in itself a sufficient basis for rejecting judicial reliance on policy.

Another argument Dworkin provides in Hard Cases is that principles generate demands for equal treatment in ways that policies do not, and that the critical status of precedents in common law adjudication helps to establish the inappropriateness of judicial reliance on policy argument (T.R.S., 87). Dworkin is correct in saying that judges must treat like cases alike, but it is questionable whether or not judicial decisions based on policy disallow this. Dworkin illustrates that decisions based on policy are unfair by examining legislative subsidies (T.R.S., 92). In these cases policies are implemented by using inconsistent strategies, that is to say, the benefits of the policy may be unequally distributed. For instance, "economic efficiency may be well served by offering subsidies to all farmers, and to no manufacturers, and better served by offering double the subsidy to some farmers and none to others" (T.R.S., 92). It is true that the legislature grants subsidies to particular groups for various political and economic reasons. But it is not true that the courts grant subsidies. Legislatures have no serious responsibility to treat like cases alike. Since judicial adjudication

demands equal treatment of like cases, subsidies are ruled out and a consistent strategy is necessary for applying policies by means of a consistent strategy. This point is brought out if we consider Denning's decision to treat different sectors of the economy equally. Thus, the demand for articulate consistency is compatible with judicial reliance on arguments of policy.

Section 2: Dworkin's Reply to Greenawalt

In addition to the failure of these three arguments to support Dworkin's thesis regarding judicial reliance on principle, the thesis itself is attacked. Greenawalt in Policy, Rights, and Judicial Decision (P.R.J.) sees that Dworkin's endeavour to justify the thesis of judicial reliance on principles, leads Dworkin into the following dilemma. Dworkin's claim is both descriptive and prescriptive respectively, (1) judges always unavoidably justify their decisions through principles (2) judges should always justify their decisions through principles. The first branch of the dilemma runs: if the descriptive claim is true than all arguments that justify judicial decision are arguments of principle, thus making the prescriptive claim trivially true. Conversely, if the descriptive claim is false, arguments of policy once again become a sound means of justifying judicial decisions. Once again Dworkin is faced with a series of counter-examples such as those provided by Lord Denning. In this dilemma the value of Dworkin's claims are undercut either way. If he can supply

a strategy that will do away with all the counter-examples of arguments of policy, his efforts will be in vain for the charge of triviality will be brought against him.

The only course left open for Dworkin, enabling him to escape the dilemma, is to argue for a thesis that will support his claim and which is at the same time independent of the claim. Dworkin believes such a thesis is "to all legal questions even those concerned with hard cases, where settled law does not provide an answer, there exists one right answer". If this thesis is sound, two corollaries follow from it. The first corollary is that judges, instead of making laws, discover legal rules that prescribe rights which provide a means for answering all legal questions. This is made possible by the judge providing a theory based on principles of justice and equality which justifies the constitution, statutes and precedents. This theory captures the spirit of the legal system and provides answers to all legal questions, even those not answered by existing settled law. Dworkin calls such theorizing Herculean theorizing, and it stands as a counter-thesis to the legal positivist thesis regarding judicial discretion and judicial originality. The second corollary is that law does not end with settled law -- there are no limits to law. Since Herculean theorizing can solve all possible legal questions including those not covered by settled law, law does not run out -- it has no limits. In order for these corollaries to be true and effective at undercutting the legal positivist theses,

the "one right answer thesis" must be shown to be true.

Dworkin introduces the transformation strategy in his reply to Greenawalt's criticisms of Hard Cases. The transformation strategy would reduce all prima facie arguments of policy into arguments of principle. This type of strategy, if successful, would make Dworkin's descriptive claim true, for regardless of what judges may think, they inevitably use arguments of principle to justify their decisions. Dworkin thinks that the mistake inherent to Greenawalt's counter-examples is that they fail to draw a distinction between arguments of policy and principle, and between consequentialist and non-consequentialist theories of rights (T.R.S., 294). Greenawalt seems to associate the former members of the two distinctions together, thus ruling out the possibility of arguments of principle being concerned with consequences. If principles are not directed towards the concerns of consequences, then they are also not concerned with advancing a collective goal of a political community -- consequently, arguments of policy are necessary in adjudication to protect the welfare of the community as a whole. But Dworkin's distinction allows consequences to play an important role in the definition of abstract rights prescribed by principles in a theory justifying a legal system (T.R.S., 293). Dworkin illustrates how principles are concerned with consequences by considering a paradigm nuisance problem.

> A's property adjoins B's; B operates a factory on his property and the resulting pollution

> spoils A's enjoyment of his own property. Suppose A takes himself to the legislature and asks for a statute prohibiting persons in the position of B from polluting in the way that B does, at least unless those in the position of A consent.
>
> (Dworkin, T.R.S., 294-5)

Dworkin rightly argues that A could make two different sorts of arguments to support his request. The first is an argument of principle that appeals to rights as a justification for a political decision that enforces or protects these rights. In this case A would argue that all things considered he has a right to enjoy his property free from pollution. The second type of argument would be an argument of policy, which appeals to some collective goal of the community to justify a political decision that advances or protects that goal. A's argument of policy would run along these lines: "the community as a whole will be better off because its air will be clean if activities like those of B are prohibited or at least made to pay their way by purchasing the consent of those most immediately effected" (T.R.S., 295).

Dworkin then goes on to say that A could also give an argument of principle while giving a more consequentialist argument. For example, A could say that "the pollution of the air will injure his and his family's health, and that his rights arise from the fact that B's actions threatens an especially vital interest which A has a right to have protected by society"(T.R.S., 295). A's argument appeals to the consequences of B's acts, for A's right only arise as a consequence of B's act. Dworkin insists that this appeal to

consequences does not prevent the argument from being one of principle.

Dworkin then goes on to use arguments of principle concerned with consequences to do away with counter-examples to the descriptive claim that judges always use arguments of principle to justify their decisions. This transformation strategy supposes that all arguments of policy or considerations of welfare can be put in terms of abstract rights that are prescribed by principles in a general theory of political morality. If this move is successful, Dworkin thinks he will have done away with judicial reliance on policy for there will be no need for it. Dworkin illustrates this strategy by examining cases involving riparian owners in Massachusetts. He cites that the decision in all the cases had the effect of benefiting the expansion of capitalist industry. In most of the landmark cases that changed the rules of law, the courts used consequential justifications with reference to the general economic interest of the community as a whole (T.R.S., 298). At this point Dworkin emphasizes that we can tell two very different stories about the case: a story of policy and a story of principle.

Judges could justify their decisions on an argument of policy and "... develop rules for the distribution of power over running streams that would promote, better than other rules, the collective goal of developing and strengthening a capitalist economy ... They would not have dreamt, for example, of establishing a rule forbidding landowners to

use their land in economically inefficient ways if they wished, or allowing a more efficient user to trespass upon the land of a less efficient user. But they did not see hard cases about water as cases requiring a more precise account of the concrete rights of neighbouring landowners when abstract rights seem to conflict" (T.R.S., 298). Dworkin's second story about the case transforms all the consequential considerations of the policy story into terms of principles, while still preserving the rights of the disputants in the cases. Judges saw that the case was a hard case about the concrete rights of neighbours under changing economic circumstances. They assume that in the case of rights over the real use of land, considerations of the consequences played an important part in the definition of these rights (T.R.S., 298).

> They would have said, if asked to describe the general situation in the background moral terms, that though one has an abstract right to use his property as he wishes, it is not fair for him to use his property so as to prevent his neighbours from enjoying like rights over their own property; but that, on the other hand, it is not fair for one landowner to expect that others will refrain from useful employment of their own land so as to allow him to indulge his preference for a socially less valuable employment of his land. They might have supposed, reasonable or unreasonably, that this very rough and abstract description of the moral rights of competing landowners provided the best justification (in the hard case sense) of the law as they found it, and then set out to do their best to fashion rules of law governing riparian use that most accurately declared and most effectively protected the concrete rights that flowed from that analysis under governing economic conditions.
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> (Dworkin, T.R.S., 298-9)

There are several objections that can be made to Dworkin's transformation strategy. The first objection to the use of the transformation strategy is that, although it may solve the problem of counter-examples to the descriptive claim, at the same time it makes Dworkin's prescriptive claim trivial. Dworkin is caught by the second branch of the dilemma that Greenawalt charges him with. If the descriptive claim is true, "that judges use arguments of principle whether they think they ought to or not", the outcome will be the same regardless of what they think. Another point that elucidates the triviality that follows from Dworkin's descriptive claim is that the only difference existing between arguments of principle and policy are the terms in which the arguments are given.

The second objection to Dworkin's transformation strategy is that for it to be an effective means of doing away with counter-examples, Dworkin has to presuppose that all theories of political morality which judges use to justify legal systems, must be consequential theories. Dworkin is wrong in saying that "It does not follow from the fact that these judges (Hercules) held a consequentialist view of the dimension of concrete rights over land use that they hold a similar consequentialist theory about other sorts of rights" (T.R.S., 299). The positivist judge may have a judicial decision based on policy for every case that comes before him. Therefore, Dworkin must provide a substitute argument of principle for every case that comes

before the positivist judge. This consequentialist restriction on theories of political morality severly restricts the type of theory that Dworkin's descriptive claim allows. The consequentialist restriction also forces Dworkin to make some metaphysical commitments about Herculean theorizing which he seems to think is contentless. The metaphysical unambitiousness of Herculean theorizing is explicitly stated in Justice and Rights (T.R.S.), "But the constructive model, at least the assumption of natural rights, is not a metaphysically ambitious one" (T.R.S., 176-7). All Dworkin thinks is required for the natural rights thesis is the purely formal requirement of articulate consistency -- this leaves the content of the theory completely open. But the transformation strategy requires Dworkin to make a content restriction that the rights based theory of political morality be consequentialist. This forces Dworkin to do some metaphysics that will justify his claim that the moral state of affairs can only be captured by consequential theories of ethics.[11] The final objection to the transformation strategy is that it is insufficient for proving that judges always justify their decisions by arguments of principle. All that the transformation strategy is designed to show is that arguments of policy can be substituted by arguments of principle; but the reverse is also true. By reversing the direction of Dworkin's transformation strategy the legal positivist could substitute all arguments of

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11. The metaphysical ramifications of Herculean theorizing will be taken up in the next chapter.

principle by arguments of policy. The implementation of the transformation strategy involves the following dilemma. For the strategy to work, there must be no residual effect of principles; otherwise principles (being different from policies) could not match all policy decisions. But if this is the case, there is nothing that distinguishes principles from policies. Dworkin's reply to Greenawalt fails to supply independent arguments for the superiority of judicial reliance on principle, namely, that arguments of policy deny rights to the losing party in a dispute -- Dworkin just assumes this in his reply. Without this independent argument the transformation strategy lacks the direction Dworkin requires to support his descriptive claim -- the strategy remains a purely neutral device. Supporters of theories of policy based adjudication (judicial discretion in Hard Cases) do not have the extra task of showing the residual effect of principles. The reason for this can be traced back to the basic distinction between Dworkin and Hart, namely, the former's adherence to the position that there is a method for adjudication. Dworkin must show the existence of the distinguishing feature which ensures that judges who use the guiding light provided by principle based adjudication will give far superior decisions than the judge who uses policy based adjudication (Knack).

Section 3: Another Dworkinian Reply

In his most recent paper "No Right Answer?" (N.R.A.)

Dworkin attempts to provide an independent argument for his descriptive claim. In this paper Dworkin attempts to refute the legal positivist claim that in hard cases there is no right answer. By refuting this claim Dworkin believes that he will have established that principle based Herculean theorizing is correct, and that adjudication based on policy and judicial discretion is false. Dworkin examines two versions of the no-right answer thesis:

> (1) There is a logical space between the propositions that a contract is valid and that it is not valid, or that a person is liable or that he is not liable, or that an act is a crime or not a crime -- the first version supports that there is a third possibility.
>
> (2) The second version does not suppose that there is any third possibility and yet, it denies that one of the two alternative possibilities always holds, because it may not be true that either does. Dworkin believes that all important dispositive concepts such as "valid contract", "civil liability", and "crime" are bivalent. The bivalence thesis maintains that in every case, even hard cases, either the positive claim, that the case falls under a dispositive concept, or the opposite claim, that it does not, must be true (N.R.A., 2). Both versions of the no-right answer thesis deny that bivalence holds for important dispositive concepts in all legal cases.
>
> Since the first version of the no-right answer thesis

is derived from the second, Dworkin moves quickly to examine the latter. The second version maintains that dispositive concepts may not be bivalent when existing legal rules do not cover the cases (hard cases) in which the concepts are used. The legal positivist defends this by emphasizing: if "p" represents a proposition of law and "L(p)" expresses that fact that someone or some group has acted in a way that makes "p" true, then "p" cannot be true unless "L(p)" is true (N.R.A., 16). Consequently, if "L(p)" is not true, then a particular case brought before the court can neither fall under the rule "p" or out of the rules "p", for "p" is not a legal rule. There is no answer to the question of whether the concepts in the proposition "p" rightly or wrongly apply to the case.

There are many potential lines of criticism against Dworkin. Raz, for instance, has argued against the no limits to law thesis. (Ch. 2, Section 2). Here, consideration will be given simply to Dworkin's use of an analogy between judicial adjudication and literary exercises. "Law is an enterprise such that the propositions of law do not describe the real world in the way that ordinary propositions do, but rather are propositions whose assertion is warranted by ground rules like those of a literary exercise" (N.R.A., 20). Dworkin cites that the following would be the ground rules in a literary exercise concerned with the book David Copperfield.

(1) Any proposition about David may be asserted as

true if Dickens said it, or said something else such that it would have been inconsistent had Dickens denied it.

(2) Any proposition may be denied as false if Dickens denied it, or said something else such that it would have been inconsistent had Dickens said it (N.R.A., 20).

Dworkin holds that these ground rules serve to warrant the assertion or denial of facts in David Copperfield. According to the legal positivist, the statements of Dickens have as their analogue the propositions of law. The fact that Dickens stated the proposition in David Copperfield make the propositions part of the book. Any question pertaining to the book which can be specifically answered by some statement in the book has theoretically a right answer. A question not explicitly answered by a fact in the book, such as whether Copperfield had a homosexual relationship with Steerforth, does not have a right answer. Dickens does not say one way or the other whether Copperfield had a homosexual relationship; therefore, no right answer exists. By analogy, in the case of adjudication, legal cases not answered by existing legal rules also have no right answer.

Dworkin holds that the positivist must concede the possibility of a right answer to hard cases in different legal systems that have different ground rules about the assertion or denial of propositions of law (N.R.A., 21). Dworkin also notes that, to remain consistent with the literary-exercise analogy, we must admit that we can relax

the ground rules. Dworkin thinks a loosened ground rule would be one that allows for the assertion or denial of propositions that are not explicitly stated by Dickens. A ground rule that would accomodate this would be "propositions are true (or false) if they provide a better (or worse) justification of what Dickens stated in the book". This ground rule would allow right answers to many or all of the questions that had no right answer in the literary exercise that used strict ground rules. Dworkin thinks that by analogy the loosened rule can also occur in the adjudication example. He suggests the following as a loosened legal ground rule: judges "... assert (or deny) propositions that provide a better (or worse) fit with the political theory that provides the best justification for propositions of law already established" (N.R.A., 22-3). Dworkin attempts to undercut the second version of the no-right-answer thesis by illustrating that it is perfectly consistent with the notion of loosened ground rules. All the second version requires is that ground rules warrant the assertion or denial of propositions. But it has been shown that even with ground rules there can in theory be a right answer for all legal jurisdictions.

Two criticisms can be made against Dworkin's refutation of the second version. If these criticisms hold, the every-right-answer thesis will have been shown to be false; consequently, Dworkin's attempt to give independent support to his descriptive claim will be quelled. In addition, the

two corollaries of the every-right-answer thesis, namely, Herculean theorizing, is correct, and law has no limits, will have been undercut. The first criticism is that the analogy to literary exercises undercuts Herculean theorizing itself. Dworkin's refutation depends upon how faithful his loosened ground rule notion is to the analogy of literary exercises. Ground rules for the positivist are cashed out in terms of rules concerning the enactment of legal propositions (rules of recognition). The Austinian positivist holds that such a rule could be: "What the Queen enacts in parliament is law". Dworkin thinks that ground rules can be something more than mere rules of recognition, for they can be loosened to include as law propositions that are not enacted. Dworkin opts for ground rules that allow propositions to be asserted or denied if they provide a better or worse fit with the political theory (Herculean theory) that provides the best justification for propositions of law already established (N.R.A., 22-3). By analogy, in the literary exercise, loosened ground rules would allow propositions not stated by Dickens to be asserted or denied just as long as they fit in a thesis about David Copperfield that provides the best justification for the majority of propositions that are contained in the book.

Consequently, some of the propositions of the book may be supported by the thesis, while others count as evidence against it. In the legal example, the Herculean theory

cannot justify all existing law. Therefore, Hercules is forced to establish a theory of mistakes. A theory of mistakes justifies why those legal rules that do not cohere in the legal theory have relatively little weight compared to the rules that do cohere. Consequently, Dworkin is forced to say that the participants in literary exercises must also have a theory of mistakes to account for those propositions inconsistent with their thesis. But the notion of "mistakes" is a problem when applied to the literary analogy. It is absurd to say that parts of David Copperfield are mistakes, and for this reason passages inconsistent with the thesis, must be thrown away. The notion of loosened ground rule places "consistency within a theory" above being truthful to the text. Thus, Dworkin's loosened ground rule version of literary exercises lacks the correspondence to the text which could make it a viable account of a literary exercise. Dworkin must give up the literary exercise analogy for the benefit of preserving Herculean theorizing, but he does this only at the cost of letting the positivist off the hook, for the refutation is dependent upon the analogy.

Dworkin could reply by saying, "Why cannot the analogy just end prior to the point where mistakes are brought up? After all, the value of using an analogy is its explanatory role in elucidating what goes on in adjudication". This reply does not work. Dworkin's refutation of judicial discretion only works if the reference to the literary

criticism analogy is more than explanatory -- the refutation depends on the analogy in order to demonstrate that there is one right answer, and that there are mistakes in positive law (the latter being unsuccessfully elucidated by the literary criticism analogy). Dworkin's use of the analogy can be summed up in the following way: he wants the benefits of its persuasiveness (up to a point) without defending it.

John Mackie, in The Third Theory of Law (T.T.L.) argues that Herculean theorizing does not do away with judicial discretion, but in fact promotes it because of the subjective element involved in Hercules' moral judgments.

> ... I am tempted to speak of Professor Dworkin playing fast and loose with the law.[12] The alleged determinacy of the law in hard cases is a myth, and the practical effect of the acceptance of this myth would be to give, in three ways, a larger scope for what is in reality judicial legislation. First, it would shift the boundary between the settled and the unsettled law, it would make what on another view would be easy cases into hard ones. Secondly, this approach would encourage a holistic treatment of the law, letting very general principles and remote parts of the law bear upon each specific issue. Thirdly, rely upon their necessarily subjective views about a supposedly objective morality.
>
> (Mackie, T.T.L., 15-6)

Mackie's criticism is based on illustrating that

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12. Cf. Oxford English Dictionary: "Fast and Loose: A cheating game played with a stick and a belt or string, so arranged that the spectator would think he could make the latter fast by placing a stick through its intricate folds, whereas, the operator could detach it at once". (Quoted by Mackie).

Herculean theorizing involves moral judgments that have an irreducibly subjective element. Dworkin's notion of a valid law includes a moral dimension. Hercules' judgments about what law is on a specific issue depends on what he finds to be the best explanatory and justificatory theory of settled law. For Dworkin, what is "morally best" is not what is regarded as best in that society. If Hercules' prescriptive moral judgments are not conventionally regarded as best for society, they must be subjective (although Hercules may think they are objectively valid). The judgments of people are influenced by prejudice, training, social position and ideologies. Consequently, judges with different influences will have different convictions and different moral judgments. Thus, it is possible that two judges with different convictions, both following Dworkin's method, will construct different theories of political morality. These two theories will provide conflicting explanations and justification of existing settled law. Consequently, they will have different answers to the same case brought before them. Since the answers that a theory provides depends upon the convictions of the theorist, and convictions vary greatly among people, there will be as many answers to a legal question as there are theories of political morality. The subjective element in Herculean theorizing makes law radically indeterminate, thus ruling out the possibility of a legal question having one right answer.

Dworkin's reply to this criticism would emphasize that Herculean theorizing involves an ideal observer which serves as a metaphysical guarantor that the practical application of the method would have the same results as would Hercules' application of the method. Hercules is objective (has all the facts and is articulately consistent) and Dworkin thinks the ordinary judge is the same, but this scenario begs the problem plaguing adjudication, namely, indeterminacy of aim and ignorance of fact; problems that Hart takes into account in his theory of adjudication.

Dworkin also makes law more indeterminate by introducing a large degree of freedom for judges when they frame hypotheses about the implications of abstract principles. The legal positivist account of adjudication restricts the indeterminacy of law to hard cases where existing law runs out. In hard cases, judicial discretion is necessary for it is questionable whether or not the case falls under a particular existing law. Dworkin extends the use of judicial discretion to the wider area where judges must decide what rules fall under what principles. Finally, Dworkin's theory of mistakes adds to the indeterminacy of law by Hercules' theory of mistakes lessening the amount of settled law that can be used for making decisions. Consequently, the number of easy cases decreases and the number of hard cases increases. These hard cases are decided by abstract principles which are based on subjective moral judgments that also add to the indeterminacy of law. Thus,

although Herculean theorizing gives the impression of making law more determinate, it makes law even more indeterminate than legal positivism. Consequently, Herculean theorizing is inconsistent with the one-answer thesis. Dworkin's bid to give his descriptive claim and its corollaries support by establishing the one-right-answer thesis is impossible -- Dworkin is once again caught by the first branch of the dilemma that Greenawalt charges him with. Furthermore, a more general ramification of the inconsistency existing between Herculean theorizing and the one right-answer thesis, is that Dworkin's basic position of "a method for adjudication" becomes unattainable if he continues to hold Herculean theorizing. The reason for this is that the one right answer thesis is a corollary of the thesis regarding a method for adjudication. An essential feature of a method is that there is a set means of procedure that will get us to a set point -- but Herculean theorizing fails to get us to this single goal (one right answer). Thus, Dworkin fails to establish two essential features of adjudication. In the first chapter it was demonstrated that the Herculean theory could not provide a set means of proceeding for adjudication (the application). In this chapter, it was demonstrated that Herculean theorizing cannot guarantee that all judges will come to one determined goal.

CHAPTER FIVE

THE ONTOLOGICAL AND EPISTEMOLOGICAL UNDERPINNINGS OF HERCULEAN THEORIZING

Section 1: Introduction

In the previous chapter a hierarchical distinction regarding the various levels of polemics that exist in the Hart/Dworkin dispute was drawn -- the basic dispute existing at the level concerned with validity and the deductively inherited dispute regarding doctrines of adjudication. This chapter attempts to continue to open new avenues of concern that exist at the culminative level of the dispute -- the dispute regarding doctrines of adjudication.

In Taking Rights Seriously (T.R.S.) Dworkin places himself in a precarious position. He commits himself to the view that Herculean theorizing does not presuppose any metaphysical underpinnings, while at the same time he postulates that adjudication in hard cases has an ultimately non-discretionary basis. The latter view is Dworkin's response to the question which generates a disagreement between Hart and Dworkin, namely, "Are hard cases, where no settled law can decide the case, decided by the judge enforcing existing political rights, or are hard cases decided by implementing non-positive legal principles that are chosen by the discretion of the judge"? This question is grounded on a more fundamental question that is concerned with the validity of a legal standard, "Can the validity of a legal rule be adequately depicted by the content of a legal rule or is it the form of a rule that makes it a valid legal rule?" Dworkin, in opposition to Hart, answers both

questions by taking the former alternative supplied by each question. To the latter question, Dworkin replies that ultimately the validity of a rule is determined by the content or morality of a rule. Rules are legal not by their following from some criterion of law that ensures they have a particular form, but by how well they cohere in a general political theory which ensures a rule's morality. This leads Dworkin to answer the former question by emphasizing that even when existing settled law (precedent) does not cover a case (hard cases) law does not end, and judicial discretion is not necessary in order to decide the case. Rather, hard cases are decided by the judge enforcing an antecedently existing political right, which is provided for by a general theory of political morality, or what Dworkin calls, Herculean theorizing. Herculean theorizing involves a "natural rights" thesis which emphasizes that judges in order to be fair or just must justify their decisions by implementing a general theory that takes rights as basic, as opposed to political goals or duties. Dworkin's reply to the former question stands as an anti-thesis to Hart's thesis regarding judicial discretion.

Dworkin's thesis regarding adjudication is ground on a "constructive model of reflective equilibrium", which according to Dworkin, presupposes no ontology or epistemology. That is, Dworkin thinks that all Herculean theorizing requires is a normatively neutral methodological principle that calls for articulate consistency in reasoning.

However, I aim to show that if the constructive model merely amounts to a technique that is metaphysically unambitious, it cannot serve as a grounds for a thesis that proposes a rival theory of adjudication which can under-cut Hart's thesis. If the constructive model is metaphysically unambitious, then it could just as easily serve in underpinning Hart's thesis. Dworkin must give up the claim that "Herculean theorizing is metaphysically unambitious", and supply an underpinning that can distinguish it from Hart's thesis. This involves going beyond merely positing the constructive model, in order to make a metaphysical commitment which will rival Hart's metaphysics in The Concept of Law.

Section 2: Exposition

It is essential, first of all, to understand the technique of reflective equilibrium, for it is the method used in structuring Dworkin's deep political theory of morality. The aim of the technique of reflective equilibrium in Herculean theorizing is to generate stable concepts of equality and justice as opposed to conceptions of these. The concepts of justice and equality, in turn, are used in a political theory to ensure that consistency reigns when deciding cases that are alike, even in cases where existing law does not decide what rights and duties the disputants have. The use of the concepts in a theory of political morality prevents officials from deciding cases with prejudice or self-interest. The notion of reflective

equilibrium involves a two-way process, "we must move back and forth between adjustments to the theory and adjustments to conviction until the best fit possible is achieved (T.R.S., 164). The notion of reflective equilibrium presupposes a distinction between concepts and conceptions (T.R.S., 164). The concept of fairness implies that there is a public agreement on paradigm cases of fairness. On the other hand, a conception of fairness does not imply that there is agreement on the paradigm cases of fairness. Conceptions are private intuitions or convictions, whereas, concepts constitute public agreement in opinion. Consequently, there is only one concept of fairness, but there are many competing conceptions of fairness. Equilibrium also presupposes a coherence theory of morality (T.R.S., 160). Those principles and beliefs that cohere with the general body of principles have more weight; consequently, they will have more justificatory power when defending actions or arguing for rights. On the other hand, those principles that do not cohere with the general body of beliefs and principles will be rejected as reasons for actions or awarding rights. Dworkin thinks that his version of the technique of reflective equilibrium guarantees two essential features necessary for a theory of morality: (a) the moral theory that will be consistent with our intuitions about justice, and (b) what the theory prescribes will be universal or applicable to all individuals. The concepts of justice and equality generated by the technique

of reflective equilibrium serve to ensure that prejudice and self-interest will be absent from any theory of political morality. Consequently, the abstract rights that are prescribed by a theory using the method of reflective equilibrium are in theory awarded to all men.

Dworkin suggests two models of reflective equilibrium -- the natural and the constructive model. The natural model requires a large amount of metaphysical baggage (T.R.S., 162). Its philosophical position is analogous to that of an observation based theory of science. Moral intuitions are insights into an objective moral reality, just as observation statements in science serve as glimpses into the objective physical world. Theories of morality, according to the natural model, merely describe how morality is by discovering what moral intuitions men have and then postulating principles that reconcile any conflicting convictions. Dworkin characterizes the natural model by saying:

> Moral reasoning or philosophy is a process of reconstructing the fundamental principles by assembling concrete judgments in the right order, as a Natural Historian reconstructs the shape of the whole animal from the fragments of its bones that he has found.
> (Dworkin, T.R.S., 160)

The natural model presupposes that moral intuitions are more fundamental than the consistency within a theory. Thus, if moral intuitions conflict with a theory the theory is modified to fit the moral intuitions. Moral intuitions are clues about the nature and existence of more abstract

and fundamental moral laws. By analogy, the judge when deciding a case cannot disregard settled law (which is the analogue of moral intuitions). Precedents, like moral intuitions, are glimpses into reality, and therefore, are clues to objective principles which justify a judge's decision.

The constructive model is, on the other hand, Dworkin says, metaphysically unambitious. It does not assume that principles of justice and equality have some fixed and objective existence. It is also not descriptive; consequently, the principles it generates, are not true or false. Dworkin characterizes the constructive model by contrasting the natural scientist with the sculptor:

> It (the constructive model) treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulative features of a general theory to be constructed as if a sculptor set himself to carve an animal that best fit a pile of bones he happened to find together.
> (Dworkin, T.R.S., 160)

Since the constructive model assumes that moral intuitions are merely "stipulative features" of a general theory, rather than clues about objective morality, they can be rejected. Consistency within a theory is valued more than retaining moral intuitions. Dworkin emphasizes this when he says:

> The engine of the constructive model is a doctrine of responsibility that requires men to integrate their intuitions and subordinate some of these when necessary to do that responsibility.
> (Dworkin, T.R.S., 162)

The assumption behind the second model of reflective equilibrium is "that men and women have a responsibility to fit the particular judgments, on which they act, into a coherent program of action, or at least, that officials who exercise power over other men have that sort of responsibility (T.R.S., 160)." Dworkin goes on to argue by analogy that the judge is in the same position as a man who argues from moral intuitions to a general theory of morality. Particular precedents are analogous to moral intuitions; consequently, some precedents can be given up if they conflict with a principle which coheres well in a theory of political morality. The principle can also cover cases that existing settled law does not, for it is consistent with the bulk of precedents that are used to decide cases similar to novel cases.

By using the two-way process as a criterion for an adequate model of reflective equilibrium, Dworkin rules out the natural model as a plausible account of reflective equilibrium. This leaves the constructive model to provide a structure for Dworkin's deep theory of political morality. Although the natural model explains why a theory of justice must fit our intuitions about justice, it does not explain why we are justified in amending these intuitions to make them fit more coherently in a theory of political morality (T.R.S., 164).

According to the natural model, intuitions correspond to an objective moral reality. If they are given up in

order to provide for articulate consistency in a theory, we neglect to acknowledge an objective fact in the world. We can no more reject moral intuitions as could a paleontologist throw away some of the bones of an ancient creature he was reconstructing. On the natural model we are restricted to listing moral intuitions and then hypothesizing more fundamental principles, to reconcile apparent conflicts between intuitions. But the technique of reflective equilibrium demands that we act on principle, rather than on convictions and faith (T.R.S., 162). Dworkin argues that an official must make his principles universal or applicable to everyone:

> ... in order to achieve this he, must give up his apparently inconsistent position; he must do so even if he hopes one day, by further reflection, to devise better principles that will allow all his initial convictions to stand as principles.
>
> (Dworkin, T.R.S., 162)

Dworkin goes on to say that the natural model looks at intuitions from the personal standpoint of the individual who holds them, whereas the constructive model looks at intuitions from a public standpoint. The constructive model is a model that some one might propose for the governance of a community, each of whose members has strong convictions that differ, though not too greatly, from the convictions of others (T.R.S., 163). The constructive model is suited to group considerations of justice. Supposedly, it accommodates the intuitions of a larger group, and therefore it is important for adjudication. On the other hand, the universalization process would be

self-destructive, for every individual would believe that either false observations were being taken into account or accurate observations disregarded; consequently, the inference to objective morality would be invalid (T.R.S., 163).

Section 3: Criticism

Dworkin seems to think that only the constructive model properly fulfils the function of the two-way process in the technique of reflective equilibrium. But his criticisms against the natural model are double-bladed, and can be used against the constructive model. As we have seen, the constructive model values the consistency in a theory above intuitions. Theoretically, any intuition could be given up for the sake of preserving consistency. In light of this it seems that the constructive model cannot explain why a theory of justice must fit our intuitions about justice; it cannot serve as a plausible account of the two-way process of reflective equilibrium. For example, our intuitions about racial equality may conceivably be given up for the consistency of a coherent racist theory of justice. The constructive model requires independent justifications for why, at least, some fundamental beliefs or convictions are necessary for humans and therefore cannot be rejected for the sake of consistency within a theory.

This failure of the constructive model is only the tip of an iceberg; its failure is the result of a grand strategy implemented by Dworkin to underpin his natural

rights thesis. On examining the dispute between Hart and Dworkin, we are surprised to find that the roots of their rival theses are radically different from the theses which are exposed above the polemical ground. Hart bases his positivist account of legal validity, emphasizing the form that legal standards have, on underpinnings that are consistent with legal naturalism (as Dworkin paints it). The foundations for Hart's thesis is the social rule theory, which presupposes a minimum content of natural law, e.g. all moral and legal systems must have rules forebearing the free use of violence -- this is a natural truism due to man's vulnerability. Just as surprising is Dworkin's attempt to base his natural law account of legal validity, which emphasizes the content or morality of a legal rule, on a basis that is compatible with legal positivism. The constructive model rejects that moral intuitions are glimpses into moral reality and values the structure or the form of a general theory of political morality; the content of the theory is irrelevant. Either rights or duties can be taken as basic in a political theory of morality. The constructive model could construct a theory that "might be goal based, in which case it might take some goals like improving general welfare as fundamental; it might be rights based, taking some right as fundamental; it might be duty based, taking some duty to obey God's will as set forth in the Ten Commandments as fundamental" (T.R.S., 171-2). Dworkin only emphasizes the structure of

a general political theory of morality -- he thinks all this involves is simple articulated consistency.

> It (constructive model) presupposes that articulate consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice.
> (Dworkin, T.R.S., 162)

The structure of the theory is also emphasized in Dworkin's comparison of the presuppositions that the two models have:

> It (the constructive model) does not require that ontology because its requirements are independent of it ... The constructive model insists on consistency with convictions as an independent requirement, flowing not from the assumption that their convictions are accurate reports, but from the different assumption that it is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do and not allow appeals to unique intuitions.
> (Dworkin, T.R.S., 162-3)

If the constructive model simply involves presupposing articulate consistency, then it is merely a philosophical technique that ensures proper reasoning when formulating a theory. Consequently, not only can Dworkin's "natural rights reply" to the question regarding hard cases be based on the constructive model of reflective equilibrium, but Hart's thesis of judicial discretion can also fit into such a program of theory construction. Hart's thesis regarding judicial discretion involves supposing that hard cases are decided by the judge arguing in terms of political policies or goals in order to establish a new precedent where none exists to decide the case. According to Hart, the judge

justifies his decision in discretionary cases by showing that his decision promotes some political policy enacted by the legislature. In opposition, Dworkin's thesis regarding a general theory of political morality supposes that hard cases are decided by judges arguing in terms of antecedently existing rights. Dworkin emphasizes that judges justify their decisions in hard cases by illustrating how well the principle that prescribes the right deciding the case coheres in a general theory of political morality that the judge has constructed. At this point in the analysis of the Hart/Dworkin dispute, it is evident that either arguments in terms of policy or principle are possible in the constructive model as long as articulate consistency prevails. However, Dworkin uses the constructive model as if it provided the underpinnings for Herculean theorizing that distinguishes it from Hart's theory of adjudication. Furthermore, Dworkin thinks that he can just assume that the best deep theory of political morality, resulting from the technique of reflective equilibrium, is one that is rights based -- but this is a fundamental issue between Hart and Dworkin. Dworkin explicitly states that having rights as the basis for a political theory is merely an assumption, on pages 176-7 (T.R.S.):

> But on the constructive model, at least, the assumption of natural rights is not a metaphysically ambitious one. It requires no more than the hypothesis that the best political program, within the sense of the model, is one that takes the position of certain individual choices as fundamental, and

> not properly subordinated to any goal or duty or combination of these. This requires no ontology more dubious or controversial than any contrary choice of fundamental concepts would be and in particular, no more than the hypothesis of a fundamental goal that underlies the various popular utilitarian theories would require.

Dworkin is simply begging the question about whether or not considering rights as basic is the best political program within the sense of the constructive model. If all the constructive model calls for is articulated consistency, then Dworkin must give some independent arguments to show that a rights-based deep theory of political morality provides a more plausible account of our political convictions. These arguments must make some metaphysical commitments, namely, an ontology that illustrates that rights exist antecedently to the judicial decision, and an epistemology that enables Dworkin to say that principles generated by a rights-based theory (abstract political rights) justify judicial decisions. Dworkin is forced into accepting a nominalist ontology in order to explain how rights exist. He cannot take a realist ontology, since he has already rejected the natural model that claimed that moral intuitions are clues about objectively existing principles of justice. Dworkin is also forced into taking a coherentist epistemology in order to back the claim that abstract political rights can be used to justify judicial decisions. Dworkin's rejection of the existence of an objective political reality rules out the possibility of principles in his theory corresponding to an actual state

of moral affairs in the world. Consequently, he is prevented from taking a correspondence epistemology.

Dworkin must give an account that involves elements in addition to the technique of reflective equilibrium, in order to distance his underpinnings from Hartian underpinnings; for the constructive model does not do this. These additional considerations would show: why a rights-based thesis of political morality is more plausible than a goal-based thesis. Dworkin cannot, as he suggests on page 172 (T.R.S.), support the assumption of the superiority of the rights-based theory by merely illustrating its power to unite and explain our political convictions -- this move would only beg the question. For this strategy to be plausible, Dworkin must have already supplied a metaphysical and epistemological foundation which can account for how rights exist and how abstract rights justify decisions. Furthermore, Dworkin's claim that "rights-based theories of political morality are superior to goal-based theories", is true only if we accept the Popperian notion of a scientific theory. Such a notion is metaphysical, for it presupposes a way to justify assumptions in theories that attempt to explain and give order to phenomena in the physical world. This surely under-cuts Dworkin's claim that Herculean theorizing has underpinnings that are metaphysically unambitious.

Finally, back to the problem of the constructive model not fulfilling the criterion of the two-way process

of reflective equilibrium, namely, its inability to explain why a theory of justice must fit our intuitions about justice. This problem is also solved by arguments independent of the constructive model. Such arguments would perhaps allow Dworkin to posit certain natural truisms about men which would necessitate placing restrictions on a theory's rejecting certain fundamental convictions, e.g. the belief that "the free use of violence should be restricted". These independent arguments provide content for Dworkin's contentless constructive model, but only at the price of giving up the claim that Herculean theorizing has underpinnings that are metaphysically unambitious. If this suggestion on strategy is correct then the Hart/Dworkin dispute ascends to yet another level -- the metaphysical -- where the two theories of law are played off with one another in the arena of consistency regarding ontology.

EPILOGUE

The next generation of polemics in the Hart/Dworkin dispute will not take the form of directly debating whether or not morality is part of the criterion of legal validity, or whether or not adjudication is carried out on the basis of principle or policy. In this work we have seen the evolution of the Hart/Dworkin dispute ascend from a concern regarding issues in the realm of philosophy of law (legal validity and legal obligation) to a concern regarding issues in epistemology, philosophy of mind, and metaphysics proper.

The intention behind illustrating the ascent is two-fold. The first reason was to show that there is no resolution of the Hart/Dworkin dispute at the level of philosophy of law (jurisprudence). Prima facie (at the level of jurisprudence) both theories of law seem consistent and can account for various legal phenomena; as far as the criteria of cogency and explanatory power are concerned, the dispute comes to a draw. The second reason was to show that the dispute is foundationalized on core philosophical concepts, presuppositions and issues; and furthermore, that the dispute is won by the side who can formulate the more cogent philosophical platform to place his legal theory on.

In addition to mapping the logical moves that have to be made by either side of the dispute, I have taken the task of showing that the philosophical foundations of the C.L. places Hart in a far better position to defend his theory of law, than Dworkin's work does. This is not to say that Hart has won, and that, the dispute has come to an end. Rather, it is to say that the ball is now in Dworkin's court, and that the next generation of Dworkin's followers will have to make some advances in areas they may have thought irrelevant to philosophy of law.

BIBLIOGRAPHY

BOOKS:

Allen C.K. Law In The Making, (7th. Ed.), Oxford at the Clarendon Press, 1975. (L.M.).

Cross, Rupert. Precedent in English Law, Oxford at the Clarendon Press, 1968.

Dias, R.W.M. Jurisprudence, London, Butterworths, 1970.

Dworkin, Ronald. Taking Rights Seriously, Cambridge, Massachusetts, Harvard University Press, 1978. (T.R.S.).

Hart, H.L.A. Liberty, Law and Morality, Oxford University Press, London, 1969.

Hart, H.L.A. The Concept of Law, Oxford at the Clarendon Press, 1972. (C.L.).

Paton, G.W. Jurisprudence, Oxford at the Clarendon Press, 1964.

Rawls, John. A Theory of Justice, Cambridge, Massachusetts, Harvard University Press, 1971.

Winch, Peter. The Idea of a Social Science and Its Relation to Philosophy, New York, Humanity Press, 1965. (S.S.R.P.).

Wittgenstein, Ludwig. On Certainty, New York, Harper and Row Publishers, 1965.

Wittgenstein, Ludwig. Philosophical Investigations, Oxford Basil Blackwell, 1976.

Wittgenstein, Ludwig. Remarks on the Foundations of Mathematics, Cambridge, Massachusetts, The M.I.T. Press, 1972.

ARTICLES:

Dworkin, Ronald. No Right Answer?, New York University Law Review, 1978-9. (N.R.A.).

Hart, H.L.A. Definition and Theory in Jurisprudence, Law Quarterly Review, 1954. (D.T.J.).

Hoffmaster, Barry. Professor Hart on Legal Obligation, Georgia Law Review -- Jurisprudence Symposium, 1972.

Mackie, John. The Third Theory of Law, Philosophy and Public Affairs, 1978. (T.T.L.).

Raz, Joseph. Legal Principles and the Limits of Law, The Yale Law Journal, Vol. 81:799, 1972. (L.P.L.L.).

Sartorius, Rolf. Social Policies and Judicial Legislation, American Philosophical Quarterly, Vol. 8, Number 2, April, 1971.

Shiner, R.A. The Metaphysics of Taking Rights Seriously, Philosophia, (Forthcoming).

Soper, E.P. Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, Michigan Law Review, Vol. 75:473, 1976-7.

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